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IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1964**

No. 291

MINNESOTA MINING AND MANUFACTURING COMPANY,
*Petitioner-Defendant,*

*vs.*

NEW JERSEY WOOD FINISHING COMPANY,
*Respondent-Plaintiff.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF FOR PETITIONER-DEFENDANT

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NEW JERSEY WOOD FINISHING COMPANY,
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## BRIEF FOR PETITIONER-DEFENDANT

### Preliminary Statement

Presented for review is the judgment of the United States Court of Appeals for the Third Circuit, affirming in all material respects an order of the New Jersey District Court (Augelli, D. J.) denying the motion of petitioner-defendant Minnesota Mining and Manufacturing Company (hereafter "3M") to dismiss the complaint in this private antitrust action as barred by the statute of limitations, section 4B of the Clayton Act, 69 Stat. 283, 15 U.S.C. §15b.

Judge Augelli's opinion (reported at 216 F. Supp. 507) and the order entered April 19, 1963, thereon appear in the Transcript of Record here at pages R. 58a-67a. The Third Circuit unanimously affirmed in an opinion by Judge McLaughlin printed at R. 69-92 and reported at 332 F. 2d 346. The judgment of affirmance was filed May 20, 1964 (R. 92-3).

This Court's jurisdiction derives from 28 U.S.C. §1254(1) by reason of its grant on October 19, 1964 of 3M's unopposed petition for a writ of certiorari, filed July 17, 1964, which, among other things, cited the clear conflict of the decisions below with the prior rulings of the Eighth Circuit in *Highland Supply Corp.* v. *Reynolds Metals Co.*, 327 F. 2d 725 (1964), aff'g on the point at issue 221 F. Supp. 15 (E.D. Mo., 1963), and of the District Courts in *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 223 F. Supp. 712 (E.D. Tenn., 1963) and *Farmington Dowel Products Co.* v. *Forster Mfg. Co.*, 223 F. Supp. 967 (D. Me., 1963).

The Court's grant of certiorari included an invitation to the Solicitor General to file a brief expressing the views of the United States (R. 94). We also understand that counsel for the appellee in *Highland Supply* seeks leave to file a brief *amicus*.

## Constitutional Provision and Statutes Involved

The constitutional provision involved is the due process clause of the Fifth Amendment to the Constitution of the United States: "No person shall * * * be deprived of life, liberty, or property, without due process of law * * *."

The statutory provisions principally involved are Sections 4B and 5 of the Clayton Act. Enacted in 1955, Section 4B, 69 Stat. 283, 15 U.S.C. §15b provides, in relevant part, that:

> "Any action to enforce any cause of action under sections 4 or 4A shall be forever barred unless commenced within four years after the cause of action accrued."

Section 5 of the Clayton Act, 69 Stat. 283, 15 U.S.C. §16, in its present form (and as amended in 1955 to take

account of the enactment of Section 4B), reads, insofar as pertinent, as follows:

> "(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 4A, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto; Provided, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken * * *.
>
> "(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 4A, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: Provided, however, That whenever the running of the statute of limitations in respect of a cause of action arising under section 4 is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

Section 5 from its original enactment in 1914 (38 Stat. 731) and until 1955, read as follows:

> "A final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the

> United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, This Section shall not apply to consent judgments or decrees entered before any testimony has been taken: * * *
>
> "Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof."

Finally—and only because of the decision of the Court of Appeals below and without conceding the provision to be in any way applicable—we quote Section 11(g) of the Clayton Act as added in 1959, 73 Stat. 243, 15 U.S.C. §21(g):

> "(g) Any order issued under subsection (b) of this section shall become final * * *
>
> (1) upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time * * *."

## Questions Presented

The fundamental issue on this appeal is whether the four-year limitation upon private treble damage actions is tolled during pendency of a Federal Trade Commission proceeding. More than five years elapsed between the

date of the acquisition of which plaintiff complains and the date this action was commenced and, consequently, both sides accept the fact that the complaint insofar as it is based on this acquisition is not timely unless the statute of limitations was tolled. Accurate comprehension of the Clayton Act's tolling provisions, however, depends upon concurrent analysis of Section 5's prima facie evidence provision. Thus, disposition of the issues raised on this appeal requires an answer to the broader question whether administrative proceedings generally were intended by Congress to have the extraordinary effects which Section 5 of the Clayton Act, as originally adopted in 1914, accorded to "suits" and "proceedings in equity" by "the United States."

That basic issue, plus a question concerning the extent of tolling, if any, were formulated in our certiorari petition in three separate but related questions, as follows:

1. Is a Federal Trade Commission proceeding a "civil or criminal proceeding * * * instituted by the United States" within the meaning of Section 5(b) of the Clayton Act, 15 U.S.C. §16(b)?

2. Is an FTC order to cease and desist the full legal equivalent of a "final judgment or decree * * * rendered in any civil or criminal proceeding brought by or on behalf of the United States" within the meaning of Section 5(a) of the Clayton Act, 15 U.S.C. §16(a)?

3. Does an FTC complaint which alleges that a series of vertical and horizontal acquisitions in the years 1952 to 1956 may substantially lessen competition in violation of Section 7 of the Clayton Act, but alleges no violation of the Sherman Act, sufficiently "complain of" Sherman Act matters to suspend the statute of limitations otherwise applicable to a private treble damage claim that the

final acquisition in August of 1956 was alone the product of a conspiracy and an attempt to monopolize forbidden by Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2?

Both Judge Augelli's opinion (R. 58a-65a; also 216 F. Supp. 507) and that of the Court of Appeals (R. 69-92; also 332 F. 2d 346) answered each of the questions presented in the affirmative, although the uniformity in result was achieved by way of markedly different routes. A negative answer to any of the three will require reversal or drastic modification of the decisions of the lower courts.*

## Statement of the Case

*The Parties:* Plaintiff New Jersey Wood Finishing Company (hereafter "New Jersey Wood"), a New Jersey corporation with its principal place of business at Woodbridge, New Jersey, is engaged in the manufacture of electrical insulation materials, some of which it sells to independent distributors who, in turn, sell to wire and cable manufacturers and other fabricators or consumers of such materials.

Defendant 3M is a Delaware corporation with its principal place of business at St. Paul, Minnesota. A highly diversified company, 3M, through a division formerly incorporated as Irvington Varnish and Insulator Company, also produces electrical insulation materials at Freehold, New Jersey, for sale to others.

The other defendant below, Essex Wire Corporation (hereafter "Essex"), a Michigan corporation, is a substantial consumer of electrical insulation materials. Until

* The third question is similar, if not identical, to that on which this Court granted certiorari in *Leh* v. *General Petroleum Corp.*, No. 348, —— U. S. ——, 13 L. Ed. 2d 85, on the same day as the grant here. We understand the Court expects *Leh* to be argued with this case.

August, 1956, Essex owned and operated Insulation and Wires, Inc. (hereafter "IWI") which, through various branch offices, distributes electrical insulation materials. Although originally named as a defendant, IWI was dropped in the amended complaint and, like Essex, did not join the appeal to the Third Circuit and is not presently before this Court.

*The Proceedings Below:* New Jersey Wood's original complaint filed November 20, 1961 (R. 5a-9a), sought treble damages and other relief for alleged violations of both Sections 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U.S.C. §§1, 2, and of Section 7 of the amended Clayton Act, 64 Stat. 1125, 15 U.S.C. §18.

Inasmuch as the action had been commenced more than four years after 3M's acquisition of the IWI assets, 3M deferred answering the complaint by stipulation and, in addition to other relief not pertinent here, moved pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the complaint or, alternatively under Rule 56(b), for summary judgment thereon on the ground that the action was barred (R. 11a-13a).

During pendency of that motion, New Jersey Wood filed an amended complaint (R. 48a-55a). While both the original complaint and the amended complaint are therefore included in the record, plaintiff's theories—and, hence, the controlling legal questions—are common to both pleadings. Judge Augelli on the motion treated with the amended complaint throughout as did the Court of Appeals (R. 72).

*The Amended Complaint:* Since plaintiff relied upon the same claims of statutory violation in respect to defendant 3M in both its original and amended complaints, the principal difference between the two—other than the

greater particularity of the latter's allegations against Essex—is that in the amended complaint the Section 7 claim was recast as a separate count. Compare R. 5a-9a with R. 48a-54a.

After certain jurisdictional facts are recited and the parties identified, Paragraph 5 relates that "in or about August, 1956" 3M acquired from Essex the principal assets of IWI "upon which the plaintiff had continuously, primarily and successfully relied for the sale, resale and distribution of plaintiff's products throughout the United States" (R. 49a).

Paragraph 9 alleges generally that "Beginning in or about August, 1956 and continuing until the date of the filing of this complaint, defendants have unlawfully contracted, combined and conspired to restrain trade in the manufacture, sale and distribution of electrical insulation products" in violation of Section 1 of the Sherman Act (R. 50a).

Paragraph 11 (R. 51a) sets forth the overt acts alleged to have been committed in furtherance of stated purposes (Par. 10) of the asserted unlawful contracts, combinations and conspiracies. Again, the first such act is alleged to have been the acquisition by 3M from Essex of the principal assets of IWI in August, 1956. Subparagraph (b) then acknowledges that, in September, 1956, 3M advised plaintiff that IWI would cease distribution of its products as of January, 1957. Thus, it is apparent from the face of the amended complaint that plaintiff's conspiracy cause of action based on Sherman Act, Section 1, arose in September, 1956, or, at the latest, in January, 1957, in either event clearly antedating the filing of this action in November, 1961, by more than four years.

Subparagraphs (c) through (i) of paragraph 11 deal with various activities of Essex Wire in the years 1956 through 1961 that purportedly flowed from its original

conspiracy with 3M formulated at the time of the latter's purchase of the IWI assets in 1956. Subparagraph (j) alleges that, pursuant to the conspiracy, 3M began—again commencing with the IWI acquisition in 1956—to purchase its requirements of magnet wire from Essex. Subparagraph (k) then claims that, in 1961, 3M resold the IWI assets to Essex, again "pursuant to the conspiracy".

Paragraph 12 (R. 54a) charges that, by the conspiracy already alleged, the defendants attempted to monopolize interstate trade in electrical insulation products in violation of Section 2 of the Sherman Act. The First Count's remaining allegations (Pars. 13-15; R. 54a) relate to plaintiff's damages and to the pendency in the period June, 1960, to August, 1961, of the FTC proceeding against 3M (but not Essex) "concerning substantially identical subject matter" as that here alleged.

Plaintiff's Second Count incorporates all prior allegations as to 3M's acquisition of IWI in August, 1956, and then alleges that the effect of that acquisition was substantially to lessen competition and tend to create a monopoly in violation of Section 7 of the Clayton Act to plaintiff's damage (R. 54a-55a).

*The Decisions Below:* By order filed April 15, 1963 *nunc pro tunc* as of February 11, 1963 (R. 56a), the District Court dismissed as time barred so much of the claim against Essex as was based on Section 7 of the Clayton Act but permitted plaintiff to restate its Sherman Act claim against Essex in terms of overt acts committed within the four years immediately preceding the filing of the original complaint.

Thereafter, Judge Augelli rendered his opinion of April 19, 1963 (R. 58a-65a) denying 3M's motion to dismiss on the ground that the Clayton Acts four-year statute of limitations had been tolled under Section 5(b) of that Act

with respect to all alleged violations of *both* the Clayton and the Sherman Acts because of the pendency from June, 1960, to August, 1961 of a Federal Trade Commission proceeding against 3M. As noted, the Third Circuit unanimously affirmed despite the express repudiation of Judge Augelli's views by the Eighth Circuit and two other district courts in the interim.

*The FTC Proceeding:* The FTC's complaint in Docket 7973 (R. 15a-26a) charged that, by six transactions in the years 1952 through 1956, 3M, already the leading manufacturer of electrical insulation tape, became a dominant producer of seven other electrical insulation product lines and that 3M's subsequent acquisition in 1956 of *two* of the three largest distributors of these products (Prehler *and* IWI) might have the effect of actually *or* potentially lessening competition and tending to create a monopoly in various aspects of that commerce. To the FTC, therefore, 3M's "acquisitions, acts and practices," violated Section 7 of the Clayton Act, as amended (Par. 6, R. 26a).

That FTC complaint, in contrast to the pleading at bar, invoked no antitrust law other than Section 7 and, except for a single descriptive reference (R. 20a), did not so much as mention Essex Wire. Apart from conventional Section 7 market share statistical comparisons, the FTC complaint did not advert to any actual "acts or practices" occurring after the 1956 Prehler and IWI acquisitions but confined its scope to types of prospective or potential effects that are both appropriate to, and typical of, Clayton Act proceedings.

This proceeding terminated in a consent order (R. 29a; 47a), entered before any testimony had been taken (Par. 6; R. 30a), calling upon 3M to divest itself only of the IWI assets. Thus, even if the order had been obtained in court by the Attorney General, it would come under

§5(a)'s *proviso* making such consent orders unavailable as prima facie evidence in private, treble damage actions.

*The Rationale of the Courts Below:* On this record, the District Court held (R. 61a-65a) that:

1. Since Section 5(b) is "separate and apart" from Section 5(a), the only question is what constitutes "pendency" of a "proceeding" without reference to whether that proceeding terminated "on consent" or resulted in a "final judgment or decree"; and

2. An FTC proceeding based on Section 7 of the Clayton Act is "an action under the antitrust laws" brought "by the United States" as to which Congress intended that private plaintiffs should have the benefits—not only of a successful prosecution—but also of "facts" developed during the FTC's investigation.

Judge McLaughlin, speaking for the Third Circuit in affirming the District Court, held that:

1. Between 1914 and 1959, FTC orders and proceedings lacked Section 5 attributes only because the orders emanating from the FTC's Clayton Act proceedings did not become final unless and until affirmed by a Court of Appeals; and

2. FTC proceedings under the Clayton Act and the resulting orders therein have since 1959—and since then solely by reason of the Finality Act amendments to Section 11—enjoyed all the efficacy of Justice Department prosecutions and actions and the judgments and decrees therein and, therefore, can constitute prima facie evidence under §5(a) and, consequently, tolls limitations under §5(b) in the same manner and to the same extent as court proceedings.

Both courts below then ruled, tersely but on similar grounds, that FTC charges that an acquisition "may substantially lessen" competition in violation of Section 7 of the Clayton Act sufficiently "complains of" conduct prohibited by the Sherman Act so as to suspend limitations otherwise applicable to private Sherman Act "rights of action".

Unless reversed, these rulings will subject 3M to a highly attenuated treble damage action instituted by a plaintiff that slept on its rights, if any, more than five years after being formally advised of the transaction by 3M of which complaint is made and several months after 3M reconveyed the IWI assets in question, a transaction which, while restoring the *status quo ante*, at the same time handicaps 3M's defense of this case since relevant records and personnel passed from its control.

## Summary of Argument

I. An FTC proceeding is not—and never was contemplated by Congress to be—"a civil or criminal proceeding" brought "by (or on behalf of) the United States." Nothing done either in amending Section 5 in 1955 or in amending Section 11 in 1959 brought FTC proceedings within the ambit of either paragraph of Section 5. Apart from the Third Circuit's affirmance, no reported case, either prior to or since the District Court opinion below, has held to the contrary. On the other hand, all such cases have uniformly—and properly—held that FTC proceedings neither serve to toll limitations nor result in admissible prima facie evidence.

II. Statutory construction, legislative history and judicial precedent aside, the decisions below represent a singularly ill-considered and unwarranted intrusion upon the Congressional province and should, therefore, be re-

versed out of doubt as to (a) the constitutionality of Section 5(a) as construed by the Court of Appeals below; (b) the alternative construction of the District Court that would divorce or compartmentalize Section 5's two subsections out of context; and (c) the wisdom of either court in injecting a novel proposition of antitrust enforcement policy into treble damage litigation after fifty years acquiescence by the judiciary, Congress and the executive as well as by the private bar in the prior concept.

III. Tolling should, in any event, be strictly construed as in derogation of the declared Congressional interest in laying controversy to rest. It is not enough that the FTC's complaint referred to *a* fact later realleged in the private complaint: there must be an actual, purposeful identity of subject matter "complained of." A Section 7 charge of a prospective lessening of competition or a tendency to monopoly as a result of a series of horizontal and vertical acquisitions ending in August, 1956, is wholly different from a charge that, in 1956, a conspiracy was formed to injure a competitor and that the first overt act in furtherance thereof was to consummate the last of that series of acquisitions and that the first impact upon plaintiff occurred in January, 1957. Hence, limitations respecting plaintiff's Sherman Act claims were not tolled and those claims are, in any event, barred.

## I

**A proceeding by the Federal Trade Commission does not toll the Statute of Limitations provided in the amended Clayton Act, Section 4B.**

In 1914, Congress described the document to which it accorded the status of prima facie evidence in the first paragraph of Section 5—§5(a) since 1955—as "a final judgment or decree" rendered in a "criminal prosecution" or a "suit or proceeding in equity" brought by or on behalf of the "United States". This language, we submit, simply—and deliberately—excluded administrative proceedings from Section 5 altogether.

While that first paragraph is not directly involved on this appeal, the answer to the question of tolling as presented here can also be obtained by thoroughly considering Congress' purposes in enacting both paragraphs of Section 5. Thus, we inquire, next, whether Congress in 1914 did intend to have Section 5 applied to administrative proceedings in any way and, if not, then whether any amendment since 1914 has revised the Congressional purpose in this respect.

We also show that, during the forty-nine years between adoption of the Clayton Act and Judge Augelli's decision, no court so much as intimated, much less ruled, that applicable limitations were tolled during pendency of an FTC proceeding; on the other hand, several courts had emphatically declared that an order emanating from FTC proceedings could not constitute prima facie evidence. Commentators, therefore, uniformly considered that FTC proceedings could not toll since, clearly if the purpose in tolling limitations was to permit a private plaintiff to await the outcome of government litigation in order to be able to use the "judgment or decree"—if a

favorable one eventuated—in his own action, it made no sense to toll limitations during the pendency of an FTC proceeding from which, because it is an administrative rather than a judicial proceeding, no admissible order could eventuate.

### A. An FTC proceeding is neither a "criminal prosecution" nor a "suit or proceeding in equity."

Because the FTC has no power to punish or fix liability for past conduct, an FTC proceeding is certainly not a "criminal prosecution." *FTC* v. *Ruberoid,* 343 U. S. 470, 473 (1951); *FTC* v. *Cement Institute,* 333 U. S. 683, 705-6 (1948).

Nor is an FTC proceeding a "suit or proceeding in equity" as originally stipulated in both paragraphs of Section 5:

> "The Commission exercises only the administrative functions delegated to it by the act, not judicial powers * * *. It has not been delegated the authority of a court of equity." *Federal Trade Commission* v. *Eastman Kodak Co.,* 274 U. S. 619, 623 (1927).

The view taken in *Kodak* has been generally followed. See, *e.g., Arrow-Hart & Hegeman Electric Co.* v. *FTC,* 291 U. S. 587 (1934), and *U. S.* v. *The Philadelphia National Bank,* 374 U. S. 321, 339 n. 17 (1963). Also consider the statement that FTC orders "are administrative orders as distinguished from judicial decrees" in *National Candy Co.* v. *FTC,* 104 F. 2d 999, 1004 (7th Cir., 1939) cert. den. 308 U. S. 610 (1939).

The antitrust bar has operated with the same understanding:

> "The rise in stature and importance of administrative agencies in recent years has, to be sure, caused changing notions as to the status of bureaus such as the FTC. It seems inconceivable, however, that in 1914, when the Commission was established and when this expression [*i.e.*, "suit or proceeding in equity"] was used in the enactment of the Clayton Act, any member of the Congress equated the administrative functions to be performed by the FTC with judicial proceedings. At that time, careful distinctions were preserved in federal courts between their jurisdiction in law actions and suits in equity and it stands to reason that the expression 'suit or proceeding in equity' was used solely to distinguish between court actions, on the law or equity side of the court docket." Butler, *Application and Constitutionality of Tolling of Statute of Limitations Provisions of Section 5, Clayton Act, in Cases of Dual Enforcement Jurisdiction*, 8 American Bar Association, Antitrust Section Proceedings 42, 46 (1956).

It is self-evident that the words "suit or proceeding in equity" in Section 5 and the words "proceedings in equity" in Section 15 of the Clayton Act, 38 Stat. 736, 15 U.S.C. §25, precisely parallel the language of Sections 4 and 9 of the Sherman Act, 26 Stat. 209, 28 Stat. 570, 15 U.S.C., §§4, 9, and that Congress therefore intended them to mean just what they meant in that Act which had long provided that "* * * it shall be the duty of the several district [now 'United States'] attorneys * * * to institute proceedings in equity to prevent and restrain such violations." Thus, "the phraseology of the Sherman Act makes indelibly clear the kind of suits that were meant." (Butler, *op. cit.*, p. 46.)

In marked contrast, Section 11(b) of the Clayton Act, 38 Stat. 734, 15 U.S.C. §21(b), provides for administrative enforcement of certain sections of that Act upon a "complaint" which may result in an "order", rather than either a judgment or a decree in equity. This formulation, drafted in 1914, has remained unchanged.

Since Commission proceedings result in administrative "orders" (a term nowhere used in Section 5) which are to be distinguished from judicial "decrees", *National Candy Co.* v. *FTC*, *supra*, and Section 5 speaks of "any civil * * * proceeding"—originally "any suit or proceeding in equity"—in specific relation to a "final judgment or decree," it is apparent that Commission proceedings do not come within the language of Section 5's first paragraph.

Judge McLaughlin reasoned (R. 84) that the "proceeding in equity" requirement was satisfied by the provisions for review in the Court of Appeals which, sitting as a court of equity, conducted a "proceeding in equity" in reviewing FTC determinations.* Judge McLaughlin thus must agree that, before FTC orders became "final" in 1959, only those FTC proceedings which were appealed could have constituted "proceedings in equity". The anomaly of such a reading becomes evident with the realization that no one could know whether "pendency" of an FTC proceeding had tolled the statute of limitations until the proceeding was completed and an appeal prosecuted. Since appellate review might take place years later under pre-1959 procedure, the statute might be tolled indefinitely.

* The Third Circuit's reliance on *Niehoff* v. *FTC*, 241 F. 2d 37, 42 (7th Cir., 1957), for this view is clearly misplaced since *Niehoff* was later reversed by this Court, 355 U. S. 411 (1958), on the holding that the FTC's determination "should not be overturned in the absence of a patent abuse of discretion" (p. 414), a holding which, of course, repudiates the notion that a Court of Appeals on review of an agency determination sits as a court of equity.

Judge McLaughlin's view that FTC proceedings themselves became "proceedings in equity" in 1959 when FTC orders became "final" simply confuses the issue: the real objection to classifying an FTC proceeding as a "proceeding in equity" arises from the inherent nature and quality of the proceeding and not from pre-1959 procedural differentiations in enforcement of FTC and Justice Department sanctions. See the discussion of the 1959 amendment at pp. 41-44 and Point II(A), *infra*.

**B. An FTC proceeding is not instituted "by the United States".**

Since enactment in 1914, Section 5 has stipulated that, to toll the statute of limitations, the civil proceeding in question must be one "instituted *by* the United States."*

In the first and leading case on the point, *Proper* v. *John Bene & Sons*, 295 Fed. 729, 732 (E.D. N.Y., 1923), the court ruled that, "strictly speaking", an FTC proceeding is not brought "by or on behalf of the United States". Cf. *FTC* v. *Nash-Finch Co.*, 288 F. 2d 407 (D.C. Cir., 1961). And it has been specifically held that the FTC and the United States are separate parties, *e.g.*, *U. S.* v. *Aluminum Company of America*, 1 F.R.D. 48 (S.D. N.Y., 1938), clearly the traditional view of the relationship

* A similar requirement in the prima facie evidence provision provides that the proceeding must be "by *or on behalf of* the United States," a curiosity of draftsmanship upon which no authority seems to have remarked although the Senate Committee struck the "on behalf of" language from the tolling provision as passed by the House. Sen. Rep. 698, 63d Cong., 2d Sess., pp. 57-59 (1914). Of course, the tolling provision is, if anything, more restrictive in this respect. Some awareness that the distinction may be significant appears in Judge McLaughlin's constant characterization of FTC action as being "on behalf of the United States" rather than "by the United States" (R. 79; 81). This reiterated slip, perhaps unintentional, in some measure belies the consistency of the Court's argument.

between the United States and its agencies which finds expression in many statutes* and judicial decisions.

It is the Department of Justice which is normally thought to bring actions "by the United States" and any agency which can sue or be sued in its own right is not "the United States." Indeed, instances in which the United States and an agency have appeared in actions as separate parties and presented opposing views are common. See *e.g., Henderson* v. *United States,* 339 U. S. 816 (1950); *United States* v. *Interstate Commerce Commission,* 337 U. S. 426 (1949). By the same token, when the "United States" refused to argue a case on behalf of the FTC because of a conflict in the views of the Commission and the Solicitor General, the Commission appeared on its own behalf and argued its own views. *Standard Oil Co.* v. *FTC,* 340 U. S. 231 (1951). See Stern, *"Inconsistency" in Government Litigation,* 64 Harv. L. Rev. 759, 768, note 31 (1951).

On the other hand, the Commission has clearly regarded itself as distinct from the "United States." Thus, the FTC contended in *FTC* v. *Nash-Finch Co., supra,* that the action should be dismissed for failure to join the "United States" as an indispensable party. The Circuit Court—apparently accepting the distinction between the agency and United States as fundamental—held that "the United States" was not indispensable because no action "by the United States" was under attack; instead "action of the Commission alone is now challenged." See 288 F. 2d at 410.

Other aspects of antitrust enforcement clearly depend on observance of and adherence to this basic difference. For instance, Section 11(l) of the Clayton Act, 15 U.S.C.

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* *E.g.,* Sections 2403 and 2408 of Title 28, U.S.C., 62 Stat. 971, 972, both treat with the "United States" as a party to judicial proceedings. Had Congress intended to include agencies such as the FTC within the term "United States", the words "of any agency" in Section 2403 and "any department or agency" in Section 2408 would have been superfluous.

§21(l), provides penalties upon proof of a violation of an FTC order to be recovered in a civil action brought "by the United States." For all that appears, no one—including the Federal Trade Commission—has ever entertained the slightest doubt that these words, identical to those in Section 5(b) regarding tolling, require an action in court by the Justice Department. See, for example, 5 CCH Trade Reg. Rep'r., Pars. 50,118; 50,126; 50,185; 50,193. The Commission has always similarly interpreted the equivalent provision of the FTC Act after its amendment by the Wheeler-Lea Act in 1938, 52 Stat. 111, 114; 15 U. S. C. §45(l).*

Surely the conclusion that the United States and the Federal Trade Commission are different parties is inescapable in view of Section 11(e) of the Clayton Act, 38 Stat. 734, 15 U.S.C. §21(e), which expressly provides that no order of the Federal Trade Commission shall absolve any person from liability under the antitrust laws. The equivalent provision in Section 5(e) of the Federal Trade Commission Act, 15 U.S.C. §45(e), was the principal basis for the holding in *U. S.* v. *Charles Pfizer & Co.*, 205 F. Supp. 94, 97 (S.D. N.Y., 1962), that the United States could proceed with a Sherman Act indictment against certain defendants which were also respondents in a pending FTC proceeding brought under Section 5 of the Federal Trade Commission Act but based on similar or identical

* Note the Commission's procedures in certifying violations and requesting the Attorney General to sue for the civil penalty as elaborated by an FTC representative at "Finality of Clayton Act Orders", Hearings Before Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives on H.R. 432 etc., 86th Cong., 1st Sess., May 27-May 28, 1959, Serial No. 3, pp. 21-22 (hereafter "the 1959 Hearings"). Note, also, that it is the "United States" which, when injured in *its* business or property by an antitrust violation, sues to recover damages "by *it* sustained." Clayton Act, §4A; 69 Stat. 283, 15 U.S.C., §15a. Again, it has never been suggested that the FTC—or any arm or agency other than the Attorney General—could prosecute such suits.

facts, although the hearing examiner had already recommended that the FTC complaint be dismissed. Judge Ryan pointed out that, even if the Commission ultimately exonerated the defendants, the agency's findings would not bind the United States and would not be admissible at trial. Accord: *McKesson and Robbins, Inc.* v. *Charles Pfizer & Co., Inc.*, ___ F. Supp. ___ (E.D. Pa., Nov. 4, 1964); *Matter of Columbia Broadcasting System, Inc.*, ___ F. Supp. ___ notes 7 and 8 (S.D.N.Y., Nov. 10, 1964); Cf. *FTC* v. *Cement Institute*, 333 U. S. 683, 694-5 (1948).

Whatever its origin, Section 11(c), common since 1914 to both the Clayton and FTC Acts, demonstrates that Congress has consistently and clearly distinguished agency proceedings from court actions and just never intended to have Section 5 apply to agency proceedings or to have the United States bound in antitrust suits by agency determinations be it the FTC or any of the several other agencies vested by Congress with an antitrust competence. Cf. Section 11(a), 15 U.S.C., §21(a).

To counter these considerations, Judge McLaughlin again relied on the 1959 act making FTC Clayton Act orders final which, in his view, also erased any need to continue the former distinctions between the United States and the Commission as separate parties. Apart from the fact that there is no logical connection between the finality of FTC orders and the status of FTC determinations as binding upon the United States, such a view ignores the substantive differences in judicial and administrative determinations of fact which both the Department of Justice and private litigants have sought to preserve. See the discussion at Point II(A), *infra*.

Moreover, Judge McLaughlin took no account of §5(a)'s stipulation that a "judgment or decree" in a governmental "civil or criminal proceeding" would be admissible only in cases where that judgment or decree "would

be an estoppel as between the parties thereto."* It may therefore be fairly argued that, if FTC orders do not estop "the United States" per *Pfizer,* etc., the FTC is obviously not "the United States" and, hence, its orders would never be admissible in subsequent private litigation. This, of course, cuts the ground completely from under the Third Circuit's contrary views. See Point II(C), *infra.*

Taken all in all, it therefore seems plain that Section 5, by unambiguous language, excludes FTC proceedings. To this extent the 8th Circuit in *Highland Supply Corp.* v. *Reynolds Metals Co., supra,* 327 F. 2d 725, was well warranted in taking Section 5 at face value and refusing to indulge in a microscopic analysis of its legislative history. Nevertheless, as we now demonstrate, that history gives more than ample substance to the phraseology selected by Congress.

### C. 1914 Congressional history demonstrates that Congress did not intend to include FTC proceedings within the scope of Section 5.

When the Clayton Act was debated late in the summer of 1914, Congress had all but completed work on the Federal Trade Commission Act. Nowhere in the legislative history of the Clayton Act, however, is there the slightest indication that an FTC order or proceeding was to be included within the scope of Section 5 (Section 6 as numbered in the drafts discussed in both houses).

First, Congress chose the term "judgment or decree" to describe the document accorded admissibility as prima facie evidence. As pointed out by Butler, page 16, *supra,*

* By the same token, the court below failed to note that Section 5(a) speaks of a "judgment or decree * * * that a *defendant*" has violated the antitrust laws. "Respondent" has, of course, always been the preferred nomenclature in FTC parlance as well as in its Rules of Practice.

the alternative definitions simply distinguished between law and equity actions in a court in conventional legal parlance of the day.* On the other hand, while the term "order" does not appear in Section 5, that is the term Congress selected in Section 11(b) of the Clayton Act to describe the final disposition of an administrative proceeding. Cf. Administrative Procedure Act, §2, 60 Stat. 237, 5 U.S.C. §1001(d).

Second, the floor debates do contain considerable material that manifests a clear Congressional understanding that Section 5 was not to apply to FTC—or any other—administrative proceedings. Thus, during discussions of the effect that FTC orders should have in subsequent proceedings:

> "Mr. Sutherland: * * * So far as the findings of the commission are concerned, I do not think they ought to be evidence anywhere.
>
> "Mr. Crawford: I do not, either.
>
> "Mr. Sutherland: I doubt very much whether we could make them evidence * * *." 51 Cong. Rec. 12789-90 (1914).

Senator Walsh led the fight to sustain the House version making a decree in a suit by the United States *conclusive* rather than prima facie evidence in any subsequent private action against the defendant. His principal argument that a defendant against whom such a decree was introduced had already had his day in court was obviously—and necessarily—premised on the belief that such evidence could emanate only in a judicial pro-

* "Little time need be spent defining a final judgment or decree, since it is generally accepted as the pronouncement of a court of last resort or, if no appeal is taken, the judgment or decree of the trial court." Timberlake, *Use of Government Judgments or Decrees in Subsequent Treble Damage Actions Under the Antitrust Laws*, 36 N. Y. U. L. Rev. 991, 994-5 (1961).

ceeding. The defendant, maintained the Senator, "has had an opportunity to try out before a *court, with all the forms of the law,* every question involved in the *lawsuit* • • •. Here the party has had its day in *court.* He has tried every issue and it is simply a question, now that he has it tried, whether he may insist upon a *second trial.*" 51 Cong. Rec. 13851, 13857 (1914).* The same point was made in the House debate by Representative Floyd (who co-authored the bill with Judge Clayton):

> "• • • so far as that decree as between the Government and the corporation is concerned, I do not believe that anyone can question the justice or the right of making it conclusive. Such decree imports absolute verity, binding upon the Government and the party to the suit, both as to findings of fact and questions of law determined in the suit. Does anybody question that? *That is the common rule of law applied to all judgments and decrees of all courts of record.* That is an old doctrine of the law. Then what do we propose in this case? The word 'conclusive' seems to have created confusion in the minds of a great many persons. What are we seeking to do? We are not giving to that decree any element or quality except such as attaches to every other decree. A decree or judgment of a *court of record* imports upon its face *absolute verity.* Such decree is binding upon all parties to the suit, and cannot be attacked collaterally. What we are attempting to do in this case is to apply that decree, with its usual effect, with its usual force, in another suit wherein one of the parties was not a party to the original suit." 51 Cong. Rec. 9489 (1914).

See also the remarks of Representative Scott who employed similar language in advocating the proposal to make Section 5 decrees conclusive:

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* Emphasis in this, and all succeeding quotations, is supplied unless otherwise specified.

> "It seems to me rather inconsistent to say that it would be unfair to conclude the corporation charged with conspiracy by a decree of a *court of equity* and then say it would be fair to conclude an individual who brings a suit for damages by a decree of a *court,* and in a *suit* to which he was not a party * * *. I am inclined to the opinion that if the corporation is brought into a *court of equity* upon a proper bill and by a proper service, and with subject matter over which the *court* has jurisdiction, that probably the findings of fact would be conclusive upon the corporation and would be binding, leaving open only the matter of damages to be submitted to the jury." 51 Cong. Rec. 9492 (1914).

Clearly any understanding that administrative orders —*i.e.,* orders not necessarily the product of a proceeding with "all the forms of the law"—as well as court judgments were to be admissible in a private suit, would have turned Senator Walsh's point to the advantage of the many who questioned the constitutionality of his proposal.

Any thought that the senators were using "court" in a way that might include the Federal Trade Commission was dispelled by Senator Myers of Montana speaking in support of an amendment to the Trade Commission Act that would allow any FTC determination to be tried *de novo* by the court on appeal:

> "The proposed trade commission will not be a court; it will not have judicial powers; it will not necessarily conduct its inquiries according to the rules of court procedure or the rules of evidence or any rules of law. There does not need to be a single member of the commission a lawyer; all may be laymen. To provide that these men shall pass on valuable property rights, which may affect the investments of millions of dollars, without full right

> of recourse by those affected to the courts, to be there passed upon according to law, is, to me, incomprehensible." 51 Cong. Rec. 13106 (1914).

In a somewhat different context, Senator Reed made the same point most succinctly: "The fact is, as everyone knows, that the Trade Commission could not deal with criminal penalties because it is not a court." 51 Cong. Rec. 16154 (1914).

Equally persuasive is the testimony demonstrating that the tolling provision would apply only in the event of governmental judicial proceedings. Again, Representative Floyd to the House:

> "Many combinations have been dissolved under the Sherman law by the decree of the *United States courts*. The proceedings were lengthened out for years, and at the end of the suits they were adjudged by the *courts* to be unlawful combinations, and yet parties who had been injured by the unlawful acts of those corporations were without redress. This proposes to suspend the statute of limitations during the continuation of *such suits* * * *." 51 Cong. Rec. 9164 (1914).

Throughout the debates, the terms used indicated that the speakers thought exclusively in terms of—and, *a fortiori*, intended only—judicial proceedings. Certainly the phraseology employed was and is wholly inapplicable to administrative proceedings.

Thus, Representative Nelson criticized an amendment that would have made a judgment or decree binding upon private plaintiffs as well as upon the government: "Although the independents have never had their day in court, they are absolutely bound by any feeble compromise the *Attorney General* may make." 51 Cong. Rec. 9169 (1914).

Or again, Senator Cummins: "But when the suit is brought, then the *judgment or decree* of the *court* in the suit that has been brought by the government would be prima facie evidence of violation of antitrust law * * *." 51 Cong. Rec. 13850 (1914).

Eventually the Senate Judiciary Committee cut back the evidentiary effect of a Government decree from "conclusive" to "prima facie" expressly on constitutional grounds. Sen. Rep. 698, 63d Cong., 2d Sess., 45 (1914). It is almost inconceivable that those who so successfully opposed making a decree conclusive against a defendant would have failed to add to their constitutional argument by pointing out that such a "conclusive decree" could emanate from the new Trade Commission under the loose procedures that everyone realized it might use and even intended it to use. That this argument is nowhere recorded is at least some evidence that no one supposed that Commission proceedings and orders were in any way involved.

Actually more tangible evidence is also at hand. When an amendment was offered by Senator Bryan to strike the words "in equity" so that the provision would simply read "any suit or proceeding", Senator Reed observed "that would cover any kind of proceeding"; in other words, an argument could possibly then be made that the new language would extend to "proceedings" by administrative agencies. Senator Bryan thereupon withdrew his amendment, 51 Cong. Rec. 13897-8 (1914), and, as we know, the precise, well-recognized phrase "in equity" was retained.

At the same time the Senate added the phrase "criminal prosecution" and Senator Culberson observed that this language would prove sufficiently broad to include all actions by the United States because:

> "There is no suit authorized by any of these statutes *by the United States* except a criminal

prosecution or a suit in equity. The United States does not bring a suit at law for damages." 51 Cong. Rec. 13898 (1914).

Another critical comment by Senator Reed on the limited sanctions at the command of the newly-established Trade Commission indicates that he never imagined that Commission orders could constitute evidence in a subsequent treble damage suit:

> "We thought it would be easy to prove a particular practice and to impose a swift and speedy penalty. We end by taking every penal provision out of the trust sections of this bill. We end by providing a smooth and easy road which may be travelled through the years, until finally a commission shall issue an innocuous, nonenforceable decree, a decree that can be vitalized only by being affirmed by a court. At the conclusion of all the litigation we propose to impose no penalty, levy no fine, send no one to jail and we permit the culprit to preserve his swag!" 51 Cong. Rec. 15867 (1914).

Proponents of the Trade Commission and Clayton Acts as written could have effectively answered that taunt if they had been able to reply that, as a result of their labor, the culprit might well lose his swag and far more because the Commission's order would be admissible as prima facie evidence in a private treble damage action. No one offered this retort, however, even though Senator Reed's complaint was repeatedly echoed by those who believed the Commission should be given power to impose penalties.

The available answer came from Representative Webb who pointed to the advances made by Section 5 and by Section 11 (which gives the FTC jurisdiction over certain Clayton Act violations):

> "Now the value of these two sections is this: That they not only give the individual the right to

sue for treble damages where he pleases, and we not only suspend the statute of limitations if a Government suit is brought against a trust, but we *also* require the Federal Trade Commission to stop these practices and take those guilty of such practices into court.

"But that is not all. Some argue that after the Trade Commission takes jurisdiction that excludes individuals from pursuing those other remedies. The bill further provides:

"No order of the commission or board *or* the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the antitrust acts.

"So you may have three or four distinct remedies, all of which may be invoked at the same time." 51 Cong. Rec. 16274 (1914).

Thus, it quite clearly appears that Representative Webb distinguished a "Government suit"—and "Government" throughout the debates is used synonymously with "the United States"—during which the statute of limitations would be tolled from a Federal Trade Commission proceeding which would have the limited but important effect of stopping unlawful practices in the future. He obviously could have added materially to his point if FTC proceedings were also to toll the statute of limitations.

It is, therefore, palpably plain that Congress concluded its labors on both the Clayton and Trade Commission Acts in 1914 with no articulation by anyone of any idea that Section 5 was to, or should be adapted to, comprehend Commission proceedings as either tolling limitations while pending or resulting in admissible prima facie evidence when litigated to a conclusion, much less both. The only intimation along these lines which did appear was firmly squelched.

However, Judge McLaughlin turned from the obvious, compelling inference with the comments that the legislative history as to the relationship between the two parts of Section 5 is "sparse" and that the question as to whether FTC proceedings were to toll limitations "was not squarely met by the 1914 legislators" (R. 87). If these comments be apt on a reading of the full 1914 record, they are even more pointed in respect to the 1955 amendment of Section 5 and the 1959 debates on the Finality Act. In no case, as we shall demonstrate, did any legislator, senator or representative, or any FTC staff or Justice Department spokesman so much as hint that Section 5 ever had—or should have—anything whatever to do with Trade Commission proceedings much less intimate that the FTC prosecuted (a) civil proceedings (b) by the United States (c) against "defendants" which (d) resulted in a judgment or decree. See *Farmington Dowel Products Co.* v. *Forster Mfg. Co., supra,* 223 F. Supp. 967.

**D. Authorities considering Section 5 after 1914 and before its amendment in 1955 uniformly held that FTC proceedings and orders were not included.**

Occasions only rarely arose in the next forty years in which courts construing Section 5 as originally enacted were required to distinguish between judicial suits and administrative proceedings. To some degree, those four decades of silence in a most litigious area in which the FTC has certainly been active bespeak at least tacit acceptance of the theory of this appeal. As Justice Frankfurter once remarked, "* * * just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to

exercise it, is equally significant in determining whether such power was actually conferred." *FTC* v. *Bunte Bros.*, 312 U. S. 349, 352 (1941).

When the applicability of Section 5 to FTC orders first arose in *Proper* v. *John Bene & Sons, supra,* the Court refused to admit an FTC order, holding, *inter alia:*

> "* * * (1) That the proceedings before the Federal Trade Commission did not result in a final judgment or decree. (2) There is grave doubt whether the proceedings before the Commission is a proceeding in equity. The Commission itself is rather an investigating body than a judicial tribunal, and its order has no binding effect until it has received the judicial sanction of the Circuit Court of Appeals. (3) Strictly speaking, it would seem that the proceeding is not brought by or on behalf of the United States, inasmuch as it is instituted by the Federal Trade Commission, although it may well be held that this body as a creature of the government may be said to be acting on behalf thereof * * *." 295 Fed. at 732.

While the tangential decision in *International Tag & Salesbook Co.* v. *American Salesbook Co.*, 6 F.R.D. 45 (S.D. N. Y., 1943), is obviously in accord, it remained for Judge Wyzanski to state clearly in *U. S.* v. *United Shoe Machinery Corp.*, 89 F. Supp. 349 (D. Mass., 1950), that FTC orders could not serve as prima facie evidence:

> "The Commission's cease and desist order may in many cases be as drastic as the decree of a District Court, except for the one point that the District Court's decree unlike the Commission's order can be used as prima facie evidence in a treble damage suit" (p. 356).

It also seems a fair inference that Mr. Justice Clark, in discussing Section 5(a)'s scope the following year in

*Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558 (1951), did not perceive that Congress had intended to bring FTC proceedings within its purview, *viz.*:

> "The intended application and extent of such evidentiary benefits is not revealed by legislative materials, except that they should follow equally from prior criminal prosecutions and equity proceedings by the Government" (p. 568).*

In addition to these judicial pronouncements, prominent text authorities readily—and uniformly—concluded that Section 5 did not extend to Federal Trade Commission proceedings. See, *e.g.*, 2 Toulmin's *Anti-Trust Laws*, p. 118 (1949); Kronstein & Miller, *Regulation of Trade*, p. 1106 (1953). Note, also, the comment of the Commerce Clearing House editors at 2 Trade Reg. Rep'r., ¶9157.

Only one case decided since 1914 throws any doubt on these self-evident conclusions and both Judge Augelli and Judge McLaughlin placed their principal reliance upon the original opinion which the Second Circuit declared "withdrawn" on re-hearing in *Brunswick-Balke-Collender Co.* v. *American Bowling and Billiard Corp.*, 150 F. 2d 69, rev'd. on re-hearing 150 F. 2d 74 (2d Cir., 1945), cert. den. 326 U. S. 757 (1945). There, two members of the court initially decided that, after the 1938 amendment to the FTC Act, an FTC order was final without the entry of an enforcing decree by a Court of Appeals and that such a final order could be admitted as a "final judgment" or "decree" within the meaning of Section 5 of the Clayton Act. On re-hearing, the majority reversed its previous determination and ruled the proffered FTC

* We also venture to presume that "Government"—particularly when capitalized—was intended by Justice Clark as a synonym in this context for the Department of Justice, *i.e.*, the United States, not one of its constituent, but autonomous, agencies.

order had been properly excluded from evidence after all, with the following explanation:

> "In our [original] opinion, we treated the 1938 amendment as to the effectiveness of the Commission's order as an amendment of the Clayton Act * * * In fact, it merely amended the Federal Trade Commission Act * * * We must, therefore, hold that the order of the Federal Trade Commission was correctly excluded. Cf. *Proper* v. *John Bene & Sons.*" 150 F. 2d at 74.

Judge Evans, dissenting from the Court's original determination, had, however, emphasized other requirements of Section 5 with which, in his view at least, an FTC proceeding did not comply and concluded that "* * * it seems tolerably plain to me that the quoted portion of Section 5 of the Clayton Act does not apply to an order of the Federal Trade Commission." 150 F. 2d at 73. Neither in its original opinion nor in its opinion on re-hearing did the majority analyze or consider the distinctions—apart from lack of finality of FTC Clayton Act orders—which to Judge Evans, as well as to most others, indicated that Section 5 did not include FTC proceedings and orders. Certainly the ultimate determination was correct (it was, of course, the final determination on which certiorari was denied) and perhaps not too much weight should be attached to the reason assigned by the court for reversing itself in a case so poorly presented that the Court did not at first grasp the statutory distinctions in the finality of FTC Act and Clayton Act orders.

Certainly the Second Circuit now seems to agree that administrative findings are too untrustworthy to serve as evidence of liability. In *Wright* v. *Carter Products*, 244 F. 2d 53 (2d Cir., 1957), a tort action for personal

injuries allegedly caused by defendant's deodorant, plaintiff attempted to introduce an FTC finding that "Arrid" had caused and might cause injury to a number of people. In rejecting this offer of proof, the Court cited with approval both the *Proper* case and *Brunswick-Balke* as revised on rehearing:

> "Since this finding was made in a controversy between different parties and at an administrative hearing conducted according to its own rules of evidence, it is admissible in the suit at bar only on the issue of notice and not as evidence of the fact of Arrid's propensities. Cf. *Brunswick-Balke-Collender Co.* v. *American Bowling & Billiard Corp.*, 2 Cir., 1949, 150 F. 2d 69, 74 [the determination on rehearing]; *Proper* v. *John Bene & Sons*, D.C.N.Y. 1923, 295 F. 729, 731-2." 244 F. 2d at 59, note 4.

It is for considerations such as these that we believe that the Second Circuit's original *Brunswick-Balke* opinion must be disregarded as obviously mistaken in its premises, sporadic in its teaching, erroneous in its dicta and, at best, incomplete in its analysis. Having been expressly "withdrawn," it never really became part of our case law in any event.

Thus we have only one recorded instance in each decade from 1914 through 1955 in which any contention was advanced touching upon Section 5's relationship, if any, to Federal Trade Commission proceedings and orders. Each of the reported cases dealt in greater or lesser measure with the admissibility of the results of contested FTC cases in subsequent actions. Not once in forty years did anyone claim that the pendency of an FTC proceeding had tolled the limitations period otherwise applicable to claimed antitrust violations asserted in private litigation.

The alchemy by which this discredited proposition became gold could only, therefore, have been provided by Congress when, in 1955, it reviewed Section 5 and recast it into its present form.

**E. The 1955 amendment to Section 5 did not bring FTC orders within its scope.**

Forty years after passage of the Clayton Act, Congress took cognizance of the welter of litigation caused by the lack of a uniform statute of limitations to govern treble damage actions and, at the same time, accorded "the United States" the right to sue at law for damages caused the government by antitrust violators. The resulting enactment of Sections 4A and 4B, 69 Stat. 283, 15 U.S.C. §§15a, 15b, required conforming amendments to Section 5.

A comparison of the text of Section 5 as originally enacted with the text after its amendment in 1955—the first and, to date, only occasion on which Congress has actually amended this Section—reveals that Congress:

1. Provided—as the amendment's only substantive change—that tolling the period of limitations with respect to private claims would extend not only during pendency of proceedings "by the United States" but also for one year following termination of such proceedings;

2. Divided the prima facie evidence and tolling provisions into separately lettered paragraphs; and

3. Combined the phrases "criminal prosecution" and "suit or proceeding in equity" as they appeared in both paragraphs of Section 5 into the phrase "any civil or criminal proceeding." See pp. 3-4, *supra*.

Thus, the only language change involved the description of the "proceeding" specified. All material requirements

otherwise remained unchanged; that is, an admissible decree must still be a "final judgment or decree" rendered in (now) a "civil" or criminal proceeding "brought by or on behalf of the United States" in which a "defendant" has been found to have violated one of the designated "anti-trust laws."

Again, the reports* and debates on the 1955 amendments fail to reflect any intention to import FTC proceedings into Section 5. In fact, Representative Quigley assured the House:

> "It was the specific purpose of the committee in reporting this bill to in no way affect the substantive rights of individual litigants. It is simply a procedural change and suggested with the thought of setting up a uniform statute of limitations. That is the sole purpose." 101 Cong. Rec. 5131 (1955).

Congressman Keating of the subcommittee that considered the bill detailed the actual changes offered to the tolling provisions:

> "In addition to establishing a uniform statute of limitations, the bill strikes at another problem flowing therefrom, namely, the tolling of such a statute. At the present time, the tolling of the statute, with respect to private treble damage suits, exists during the pendency *of a suit by the United States.* This period is continued by the present bill. However, in order that a person might not be deprived of the benefit of the Government suit because of an abrupt termination of the Government's litigation, the bill provides for extension of the tolling period not only for the duration of *the Government suit* but also for 1 year thereafter. Thus the injured parties are provided with

* *I.e.*, Senate Report No. 619, 84th Cong., 1st Sess., pages 1-2 (1955); H. R. Rep. No. 422, 84th Cong., 1st Sess., page 2 (1955).

an adequate time in which to take advantage of the Government's antitrust proceedings.

> "There is an added precaution also provided for in this bill to prevent undue and lengthy prolongation of stale claims. By requiring a plaintiff to institute his suit either within 4 years from the date of injury or within 1 year after the final decree in a Government case, the plaintiffs will not be afforded time to procrastinate and delay." 101 Cong. Rec. 5130 (1955).

It is simply impossible to read into this statement any purpose to extend Section 5 to an administrative proceeding. Not the slightest intimation of any design to alter the coverage of the revised subsection 5(b) can be perceived. That the committee would undertake to inform the Congress just what changes the bill would make without mentioning a change of such proportions is simply incredible, particularly in view of the fact that, by 1955, the Clayton Act had been enforced for over forty years without a definitive holding anywhere that a Federal Trade Commission proceeding could toll the statute of limitations.

Moreover, the 1955 amendments had been considered for several years, and the legislative hearings going back to 1950 and 1951 lend additional and positive support to the conclusion that FTC proceedings were not and were not to be within Section 5.

The best indication of the FTC's own understanding of the scope of the Section 5 appears in a report by Acting Chairman Lowell B. Mason:

> "The objectives of the legislation proposed by H.R. 7905 are (1) to permit the Government itself, as a private party, to sue for actual damages which it has suffered by virtue of violations of the antitrust laws; (2) to establish a Federal statute of

> limitations for all suits for triple and actual damages under the antitrust laws; and (3) to make a judgment or decree in favor of the United States in a *criminal or injunction proceedings* again [sic] a defendant for violation of the antitrust laws conclusive evidence against such defendant in a suit for triple damages by a private litigant." *Hearings Before the Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary on H.R. 7905,* 81st Cong., 2d Sess., Ser. No. 14, Part 5, p. 66 (hereafter "the 1950 Hearings").

Surely this interpretation of the language of the prima facie evidence provision by the enforcing agency is also a persuasive indication of the Commission's view of the scope of all of Section 5.

To dispel any lingering doubt that Congress may have overlooked the applicability of FTC orders, it should be noted that the House was specifically advised that Section 5 did not apply to FTC orders and against this background knowingly and deliberately refrained from making or even advocating a change. The Chairman of the American Bar Association's Standing Committee on Commerce raised precisely this point in a letter to Chairman Celler of the House Judiciary Committee:

> "(1) I note that you have changed the language of section 5 of the Clayton Act, which now reads: 'A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States' to read: 'A final judgment or decree hereafter rendered in any civil or criminal proceeding • • • brought by or on behalf of the United States.' There is no objection to this change, *unless* by reason thereof it could be contended that a final order of the Federal Trade Commission or of a circuit court of appeals affirming a Trade Commission

order is a judgment or decree rendered in a civil proceeding brought by or on behalf of the United States. *The courts have uniformly held in construing the present section 5 that a Federal Trade Commission proceeding was not within the purview of the act. Obviously, it should not be, since the Commission is not a court and proceedings before the Commission are not equivalent to a hearing in court.* It would be most unfortunate, it seems to me, to open up this question by changing the language which has already been definitely construed. A Federal Trade Commission action is not a suit or proceeding in equity. There may be some doubt, of course, whether a Federal Trade Commission proceeding can be said to have been brought by or on behalf of the United States. I respectfully suggest, however, that the committee should not inject an element of uncertainty as to the type of proceeding encompassed by section 5 and should either revert to the language of the original section or insert in the third line after (b)—an administrative proceeding or proceeding brought to review or modify an administrative order." *Hearings Before the Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary on H.R. 3408*, 82d Cong., 1st Sess., Ser. No. 1, Part 3, pp. 21-22 (hereafter "the 1951 Hearings").

Assistant Attorney General Morison in Charge of the Antitrust Division, when asked during the 1951 Hearings (15) whether the proposed language change might include an FTC proceeding, replied: "I do not have any opinion on that one way or the other. I would like to give that a little study, because that is a point that is new to me." *Ibid.*, 16.

The suggestion was later discussed by Kenneth C. Royall:

> "Now, gentlemen, there was one matter, one question, that was raised as to something about the

FTC, by Mr. Shears. I think a careful reading of that comment will show that the suggestion of the American Bar Association was *to clarify the fact that FTC operations were not to be covered.*

"Mr. Shears [Counsel to the Subcommittee]. *That's correct.*

"Mr. Royall. *They were not to be covered in this statute, and I am sure that is a sound recommendation.*

"Mr. Shears. What is your feeling with regard to the present language?

"Mr. Royall. I do not think they should be covered by this statute because they are not of a judicial, strictly judicial, nature.

"Mr. Shears. Do you feel that the present language, without the suggested amendment of the American Bar Association, excludes the Federal Trade Commission or not?

"Mr. Royall. *It never occurred to me that it included it.* I must be frank; but, *if there is any question about it,* I think *it ought to be excluded.* However, we do not affirmatively suggest that, and we just ask that the committee give whatever consideration to the meaning of the language they think proper." 1951 Hearings 58.

It is this background of explicit information presented to the House Subcommittee concerning the state of existing law relating to FTC proceedings that makes significant the fact that nowhere in the subsequent committee reports or debates of the next four years did Congress suggest that the bill under consideration would change the law. The only plausible explanation for the substitution of the phrase "civil or criminal proceeding" in both 5(a) and 5(b) for the phrase "criminal prosecution"

and "suit or proceeding in equity" used in 1914 is that, by 1955, newer concepts of practice emanating from Rule 2, F.R.C.P., had abolished proceedings in equity, inviting a conforming change in related legislation.

Perhaps the best indication that nothing contained in the 1955 amendments changed the law with respect to administrative proceedings is that neither the District Court below nor the Court of Appeals relied on the changes Congress then made as the basis for its decision. In this respect at least, both courts below accepted the interpretation of the 1955 amendments urged by 3M, as have the other courts which took up the problem after Judge Augelli filed his opinion and before the Third Circuit spoke.

### F. The 1959 amendment to Section 11 which made FTC Clayton Act orders self-enforcing did not change Section 5 expressly or implicitly.

In 1959, Congress amended Section 11 of the Clayton Act to provide that orders issued by the FTC under that Act should become final upon expiration of time to appeal and that violation of such a final order could result in a penalty of $5,000 for each day of continued violation. 73 Stat. 243, 15 U.S.C. §21(g)-(1). Hence, Congress revised the previous cumbersome mechanism for enforcing FTC Clayton Act orders and ended the disparity which had existed since the Wheeler-Lea Amendment to the FTC Act in 1938 had granted finality to FTC orders under that Act.

The Third Circuit frankly rested the entire weight of its decision on this amendment and held that, once FTC orders became enforceable upon expiration of time, they also became properly admissible as prima facie evidence

and the proceedings in which they arose would toll the statute of limitations.

The sweep of this judicial *tour de force* is apparent when one considers that Section 5 which was being construed by the Third Circuit was not itself amended in 1959 and that the legislative history which preceded the Finality Act manifests an unmistakable Congressional intention that the amendment should be *solely* procedural without effecting any change in substantive law:

> "The *sole* intent of these [proposed] subsections is to implement the enforcement procedures of the Clayton Act by making applicable the present Federal Trade Commission Act enforcement provisions. The changes contained in these subsections *are entirely procedural and make no substantive changes in law.*" H. R. Rep. 580, 86th Cong., 1st Sess. (1959) p. 6.

The Commission's understanding that the contemplated legislation was merely procedural and its understanding of the procedural handicaps to be eliminated were expressed many times. FTC Chairman Gwynne addressed a letter dated April 6, 1959 to Chairman Celler of the House Judiciary Committee:

> "The major purpose of the proposed legislation is to finalize orders issued under section 11 of the Clayton Act in the same manner in which orders issued by the Federal Trade Commission under section 5 of the Federal Trade Commission Act become final; . . .
>
> "The bills also incorporate the penalty provisions of the Federal Trade Commission Act, by providing for a civil penalty of not more than $5,000 for each violation of a commission or board order. Each violation would be considered a separate offense, except that in the case of a violation through con-

tinuing failure or neglect to obey a final order each day of continuance thereof would be deemed a separate offense. Penalty suits would be filed by the Attorney General upon the certification of the facts by the appropriate commission or board.

"The effectiveness of the Clayton Act, as amended by the Robinson-Patman Act, has long been handicapped by the absence of adequate enforcement provisions. Existing procedures are laborious, time consuming, and very expensive. The Federal Trade Commission must investigate and after complaint prove, on the record, violations of the act before a cease and desist order may be issued. After the order to cease and desist has been issued, the Commission must again investigate and again prove violations of the order and of the act before the Commission can obtain a court order commanding obedience to the Commission's order to cease and desist. Upon such proof, the court enforces the Commission's order. Only then, if the respondent violates the act a third time, does he become subject to penalty. Thus, before a respondent can actually be punished for violation of the Clayton Act, as amended by the Robinson-Patman Act, the Federal Trade Commission must conduct three successive investigations and must on three successive occasions prove violations of the law. . . .

"The proposed legislation would fill the enforcement void which has existed for many years. The Commission has sought such legislation for more than 20 years . . ." H.R. Rep. 580, 86th Cong., 1st Sess. (1959), pages 20-21.

See also the statement by Commissioner Anderson to the effect that the bill's changes were procedural, 1959 Hearings, pages 16-17, and the Commission's statement to the Committee, 1959 Hearings, pages 32-35.

Diligent study of Senate documents similarly reveals a complete absence of discussion of Section 5 or of any

impingement thereon, much less any suggestion that any change in its scope was considered or intended. Sen. Rep. 83, 86th Cong., 1st Sess. (1959). Under these circumstances, the Third Circuit's assertion that the Finality Act did somehow amend Section 5 by implication can hardly meet with favor. Cf. *U. S.* v. *Madigan*, 300 U. S. 500, 506 (1937).

To the Third Circuit, the Finality Act nevertheless meant that the FTC proceeding resulting now "in such final order *or decree* is a 'proceeding in equity' and a 'civil proceeding' within the meaning of Section 5" (R. 84-5). In so holding that, solely because of this new finality, FTC Clayton Act orders now met Section 5(a)'s requirement of a "final judgment or decree," the court below fell into direct conflict—as had the Second Circuit in its "withdrawn" *Brunswick-Balke* opinion—with the rationale by which the identical 1938 Wheeler-Lea amendments to the Federal Trade Commission Act had been upheld:

> "The constitutionality of section 5 of the statute, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U.S.C.A. § 45, is challenged. It is argued that the amendment gives to an order to cease and desist from a trade practice the full force and effect of a judgment or decree of a court, thus vesting judicial power in the Commission. The amendment provides that the order shall become final upon the expiration of the time allowed for the filing of a petition for review, if no such petition has been filed within that time. The change relates solely to the remedy of the Government for its enforcement; it does not transform the order into the equivalent of a legislative act or a judgment or decree of a court; and the provision for judicial review meets the requirements of due process." *Ostler Candy Co.* v. *FTC*, 106 F. 2d 962, 964 (10th Cir., 1939), cert den. 309 U. S. 675 (1940).

After the 1959 amendment, there were no reported decisions touching upon the applicability of Section 5 to administrative orders until the District Court opinion below. As previously noted, Judge Augelli read Section 5(b) as authorizing tolling of the period of limitations during pendency of an FTC proceeding. He did not consider whether administrative orders could constitute prima facie evidence and included administrative proceedings within Section 5(b) only because he found a broader purpose in the tolling provision than in the prima facie evidence provision. In Point II(B), *infra*, we demonstrate that this interpretation lacks any warrant in the statutory words and that previous authority had established that the two subsections are to be read *in pari materia*.

Chief Judge Taylor of the Eastern District of Tennessee first considered Judge Augelli's determination and, in *Volasco Products Co.* v. *Fry Roofing Co.*, 223 F. Supp. 712 (E. D. Tenn., 1963), rejected that ruling as "doubtful authority" (p. 713). Next, Judge Meredith in *Highland Supply Corp.* v. *Reynolds Metals Co.*, 221 F. Supp. 15, 17 (E.D. Mo., 1963) noted that, although the FTC shares jurisdiction with the Justice Department to enforce certain sections of the Act, this could not alter the fact that Congress "by its language" had provided for a tolling of limitations only for judicial proceedings. Finally, in *Farmington Dowel Products Co.* v. *Forster Mfg. Co.*, *supra*, 223 F. Supp. 967, Judge Gignoux concluded after a thorough review of the legislative history and previous judicial interpretations of Section 5 that FTC proceedings had never been and were not within its purview.*

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* The First Circuit denied plaintiff's application under §1292(b), 28 U.S.C., to appeal Judge Gignoux's decision in an order dated December 10, 1963 (Case #6244).

During pendency of the appeal to the Third Circuit in the case at bar, the Eighth Circuit accepted an interlocutory appeal in the *Highland Supply* case and, while reversing the District Court's rulings on other grounds, expressly affirmed Judge Meredith's holding that an FTC proceeding could not toll the statute of limitations in a unanimous opinion by Circuit Judge Ridge. To the Eighth Circuit, the language of Section 5 so clearly excluded FTC proceedings that resort to legislative history for guidance was unnecessary. *Highland Supply Co.* v. *Reynolds Metals Company, supra,* 327 F. 2d at 730. Here again, Judge Augelli's views were characterized as "of doubtful authority" and the court expressly refused to follow the implications of the original *Brunswick-Balke* opinion, as had all three district courts.

Nor did even the Third Circuit follow Judge Augelli in his construction of Section 5. Instead, that Court advanced the novel interpretation that administrative orders and proceedings came within the ambit of both paragraphs of Section 5 thanks to the elimination by Congress of the procedural difficulties which formerly beset FTC Clayton Act orders. This, said Judge McLaughlin, "vitalized" (R. 91) the *Brunswick-Balke* rationale (which had hardly flourished since it was "withdrawn" when first announced and was subsequently expressly repudiated in *Wright* v. *Carter Products, supra,* in the same Circuit).

The separate paths by which the courts below reached the same conclusion is simply reflective of an underlying question of antitrust policy: Should FTC determinations only define and prohibit future conduct of respondents or should such findings, in addition, determine rights (and monetary liabilities) in subsequent disputes between respondents and third persons?

Faced squarely, it is obvious that the decisions below both adopt the latter view, Judge Augelli because he did not think rights should devolve on whch of two governmental arms first takes up the cudgels and the Third Circuit because of an assumed extension of Section 5 through a procedural amendment to Section 11. The Circuit Court's rationale is only slightly more sophisticated than that of the District Court: Both defy the Act's plain language, the evident Congressional intent at all stages and the better reasoned cases. Both also, as we now demonstrate, speak to most dubious policies of antitrust enforcement although, so to speak, on different wave lengths.

## II

**In extending Section 5 to administrative proceedings, the courts below erroneously invaded the province of Congress.**

Although the basic task on this appeal is to determine what the statute means—and, as advocates, our primary concern is with what the law is rather than with what it might or should be—policy considerations may nevertheless throw light beyond that cast by the language of the Act itself, its legislative history and prior judicial construction.

Those who might feel, with the Third Circuit, that the 1959 amendment brought administrative proceedings within the scope of Section 5 must, in all candor, concede they are inferring Congressional purposes never before articulated. On the other hand, to those who might think, with Judge Augelli, that Congress simply overlooked an obvious anomaly, several reasons for caution suggest themselves, some of which we now discuss. In the course of this discussion, we do not pretend to an all-seeing wisdom: in

fact, we are confident only, as we head down this path, that advocates in a single controversy are seldom in the best position to present all the policy questions which may be properly relevant to the problem at hand. With respect for the courts below, we suggest that judges also share this inherent limitation and that novel propositions of statutory extension are really best presented to the legislative arm. Cf. *62 Cases of Jam* v. *U. S.*, 340 U. S. 593, 596 (1951).

### A. Constitutional implications of the Third Circuit's Rationale.

Our law has always recognized qualitative differences between judicial and administrative determinations of fact. So far, problems of Constitutional due process arising from these differences have been avoided by allowing no scope to FTC orders in determining financial liability. Courts have recognized that, when liability for past conduct is at issue, private persons are better protected by the safeguards surrounding judicial inquiries and we have generally adhered to the right, waivable of course, to trial by jury where such liability—criminal or monetary—is at stake.

Thus government antitrust prosecutions and "civil proceedings" carry all the inherent common law safeguards designed to validate the judgments and decrees reached in that wholesome, if laborious, process which antitrust (and all other) "defendants" have properly come to regard as their "due."

Although not always carefully analyzed in the cases, it seems incontestable that most authorities from 1914 on detected substantive differences in the quality of judicial and administrative determinations of fact which formed the basic policy underlying the distinguishing words used

by Congress whenever it referred to judicial or administrative processes and determinations.

These recognized qualitative differences in fact determinations spring ultimately from the relatively unrestricted manner in which information, incompetent in a common law court, might provide the foundation for administrative determinations and actions. Since the function of agencies such as the FTC is also investigative and quasi-legislative—that is to discover and eradicate "unfair methods of competition"—Congress determined in 1914 that rules of evidence could and should be relaxed, and the Trade Commission and others took advantage of this freedom:

> "The surveys and summaries of judicial decisions set forth above indicate that the Interstate Commerce Commission, with judicial sanction, contents itself largely with infringement of the hearsay rule, the Federal Trade Commission with violation of the hearsay rule, the best evidence rule, and the opinion rule. * * * The Federal Trade Commission receives, with judicial approval, lay opinions as to the use of solutions, hearsay as to events and correspondence not within a witness' knowledge, secondary evidence as to the contents of books, and testimony immaterial because not connected." Stephens, *Administrative Tribunals and the Rules of Evidence* (Harvard, 1933), page 90.

A more recent study concludes that judicial review of FTC determinations has always been and remains broader than similar review of ICC findings both because of judicial concern for the quality of FTC findings and because FTC regulation touches the very heart of private business conduct. Cooper, *Administrative Agencies and the Courts,* (Michigan, 1951), pages 360-70. See also generally an earlier study by McFarland, *Judicial Control of the Fed-*

*eral Trade Commission and the Interstate Commerce Commission, 1920-1930* (Harvard, 1933).

The policy behind relaxation of the rules of evidence, however, could not persuasively apply to that portion of the work of the FTC and other agencies which was concerned with adjudicating instances of prohibited conduct by individuals and corporations, a process which more or less corresponds to the work of the courts. Any real impracticality in requiring the Commission to work separate procedures to govern its different activities was obviated, however, when Congress in 1914 provided that the Commission's sanction in its adjudicative proceedings should operate prospectively only. The objective in 1914 was to prohibit the demonstrated proclivities of trusts before they reached Sherman Act proportions and, to this end, Congress created a Trade Commission that could devote itself to investigating and bringing to light cases of otherwise undefined "unfair methods of competition" as they might arise on a case-by-case basis in an attempt to balance the ingenuity of the trusts with an administrative expertise through §5 of the FTC Act. The Commission was also to enforce prohibitions against business practices considered so offensive that they were expressly defined and forbidden in Sections 2, 3, 7 and 8 of the Clayton Act. But in both Acts, Congress rejected proposals to provide sanctions for past conduct which the Commission might determine to be a violation and the enforcement mechanism was confined to ordering the respondent to cease and desist from prohibited conduct in the future, a remedy peculiarly appropriate to regulation in new and uncharted seas. Using Commission orders as prima facie evidence or, for that matter, tolling limitations during Commission proceedings would directly punish respondents with treble damages for past conduct found unlawful only by the Commission operating under administrative procedures and standards of evidence.

This Court in *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683 (1948) would never have justified Commission procedures that admitted hearsay and other legally incompetent evidence, if the Court had believed that Commission orders could thereafter constitute prima facie evidence of past conduct or that Commission proceedings could toll the limitations otherwise applicable to past conduct:

> "Furthermore, administrative agencies like the Federal Trade Commission have never been restricted by the rigid rules of evidence. * * * And of course rules which bar certain types of evidence in criminal or quasi-criminal cases are not controlling in proceedings like this, where the effect of the Commission's order is not to punish or fasten liability on respondents for past conduct but to ban specific practices for the future in accordance with the general mandate of Congress." (pp. 705-6).

Accord: *Federal Trade Commission* v. *Ruberoid*, 343 U. S. 470, 473 (1951):

> "Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future."

While seeming to concede that the FTC's "more liberal" evidentiary rules and the "broader" administration process puts FTC proceedings on "a somewhat unequal footing" with similar judicial proceedings, Judge McLaughlin, nevertheless, feels no great concern about admitting FTC orders in subsequent treble damage actions because, in his view, the defendants can always attack the "weight" of prima facie evidence if not its "propriety" (R. 88). Perhaps a defendant against whom such an order is admitted theoretically could introduce rebuttal evidence to diminish its effect. But it seems doubtful

that Judge McLaughlin intended that a defendant would —or could—prove to the triers of fact in the subsequent action that the ultimate findings and factual conclusions included in the typical commission order had been based on hearsay, lay opinions, legally unfounded or other incompetent evidence. Indeed, in all likelihood, such administrative orders would be considered the equivalent of judgments or decrees—a determination necessarily made (but contrary to *Ostler* v. *FTC, supra*) by Judge McLaughlin to qualify such orders under Section 5 in the first place—and collateral attack on a judgment is, of course, estopped; otherwise, the second action becomes a retrial of the first. Thus, the treble damage defendant could expect no real opportunity to bring to the attention of the trier of fact, much less overcome, any legally incompetent evidence which might underlie the administrative order introduced against him.

To justify the use of such evidence in private suits, Judge McLaughlin cites (R. 88) a section of the Interstate Commerce Act, 49 U.S.C. §16(13),* which provides that a reparation order of the ICC is admissible as prima facie evidence in an action for damages by a shipper against a defendant carrier found by the ICC to have exacted unreasonable rates. Even if we concede, however, that some legally incompetent evidence may underlie an ICC order which then becomes admissible—and the ICC, of course, works in a highly specialized area with data far more technical and precise than that handled by the FTC—the ICC proceeding at least does meet another requirement of due process that FTC Clayton Act enforcement could not provide. Under the ICC statute, the very issue of the monetary liability of a particular "defendant" for past conduct in relation to the particular plaintiff is first tried in an adversary proceeding,** albeit before

* Judge McLaughlin probably intended §16(2).

** See, *passim*, ICC Rules, 49 C.F.R. 1.1-1.98.

an administrative tribunal, and, if damages are awarded, that plaintiff (and no other) may then collect through court. In a private antitrust action, on the other hand, the administrative determination would be offered as prima facie evidence of monetary liability by one not previously party to the administrative proceeding.

The matter of legally incompetent evidence might also be considered from the point of view of the regulatory agencies. If, contrary to present understanding, it should become the law that agency determinations may constitute prima facie evidence in private treble damage actions, they may feel obliged to conduct their adjudicatory proceedings with greater conformity to judicial models than at present. To the extent such procedures are revised, the agencies may then create either separate internal procedures for adjudicatory and for rule making matters or, if the agencies adopt stricter rules of practice throughout, perhaps lessen their utility in their quasi-legislative functions.

If, on the other hand, the FTC, as one of the agencies involved, should fail to temper its "more liberal evidentiary rules" (R. 88), the anomalous result will be that a treble damage defendant will have a right to have his liability tested solely according to common law procedures (both in the action by the United States and in the subsequent private action) if the Justice Department happens to take jurisdiction of the matter but not so if the proceeding is initiated by the FTC. Those who believe this disparity a minor matter might well recall Dean Pound's remarks on the equality of administrative justice:

> "What are these characteristics of administrative adjudication? The more significant ones for our purpose may be summed up in seven tendencies.
>
> "First and most serious among these tendencies is one going counter to what has always been the first principle of judicial justice, namely, to hear

both sides fully and with scrupulous fairness. In administrative adjudication there is everywhere an obstinate tendency to decide without hearing one of the parties, or after conference with one of the parties in the absence of the other whose interests are adversely affected. . . .

"A second tendency is to make determinations upon the basis of consultations had in private or of reports not divulged, giving the party affected no opportunity to refute or explain. . . .

"Third, there is a tendency to make determinations of fact seriously affecting individual rights without a basis in substantial evidence or in any evidence of rational probative force, much less sustained by the reasonable weight of the evidence as a whole. . . .

"A fourth tendency is to set up and give effect to policies beyond or even at variance with the statutes or the general law governing the action of the administrative agency. It is very easy to say that the public interest demands or justifies activity beyond or in contravention of the statute and to cover this up by a general pronouncement upon the case. Usually this is done out of zeal to promote supposed social ends to which the legislative body might or might not agree. . . .

"Connected with this last tendency and with the one to decide without any basis in substantial evidence, is a fifth tendency namely, to determine facts not on the basis of hearing and evidence but on the basis of preconceptions or assumptions of facts to fit the assumed exigencies of a policy. . . .

"Another closely connected tendency, growing out of the setting up of administrative agencies to investigate, prosecute, and adjudicate, is one to make no separation of facts and law, or of facts, law, and policy to be applied to facts. In all legal systems the history of appellate procedure shows the importance of separating ascertainment of the facts, as a process, from ascertainment of the applicable law and application of the ascertained law to the facts. . . .

> "A seventh characteristic of administrative justice is a tendency to delegate decision to subordinates where the law requires decision to be made by the head, and to make decision by the responsible authority a perfunctory matter. This is something that was forbidden in judicial justice long ago." Roscoe Pound, *For the "Minority Report"*, 27 ABAJ 664, 665-9 (1941).

It is, of course, true that much of what Dean Pound criticized was corrected, or at least ameliorated, by enactment of the Administrative Procedure Act of 1946.* However, in three major facets—each, we submit, of constitutional import—the administrative adjudicative processes suffer in comparison to the judicial:

1. Agency respondents cannot avail themselves of the right of trial by jury as is the case in a criminal prosecution;

2. Legally incompetent "evidence" can still be taken by hearing examiners and accepted by the commission reviewing the record as experts; and

3. Judicial review is limited to questions of law (including, so far as the factual record is concerned, simply whether there is "evidence" in the record to sustain the findings made) and whether agency discretion has been abused (*e.g., Moog Industries* v. *F.T.C.*, 355 U. S. 411 [1958]).

These shortcomings, we submit, are accentuated in terms of constitutional due process when one considers that the treble damage feature of private antitrust enforcement is intended to be, and surely is, punitive rather than merely remedial. Not only is the victim of a proven antitrust violation to be compensated, but the perpetrator is required to pay twice again (and, for good measure, contribute handsomely to his victim's counsel fees and costs

* 60 Stat. 237, as amended; 5 U.S.C., §1001 *et seq.*

of prosecution) all in the nature of a civil fine.* There is nowhere in our law a more drastic "taking of property" and yet the courts below are prepared to take such property without trial by jury, without normal evidentiary safeguards and without conventional appellate protection.

**B. Judge Augelli's contrary rationale notwithstanding, Section 5's dual provisions should be construed together: Proceedings that cannot yield prima facie evidence do not toll limitations.**

By holding, in effect, that Section 5's two paragraphs dealt with separate problems and should be separately construed, Judge Augelli—at least for the case at hand—avoided the constitutional pitfalls to which we have just alluded. This course also obviated equating FTC cease and desist orders to §5(a)'s requirement of a "judgment or decree." However, Judge Augelli's rationale cannot provide a safe retreat from those infirmities implicit in the Third Circuit's decision.

One arresting aspect of this case is that, while we argued in both courts below that administrative orders cannot constitute prima facie evidence of antitrust violations, our adversary has consistently refrained from arguing that they can. Given the state of the law on this point before Judge McLaughlin wrote, plaintiff's circumspection seemed well warranted. Our effort to convince those courts that the prima facie evidence paragraph of Section 5 did not embrace administrative proceedings was, we felt, required—notwithstanding that the particular FTC order here was entered on consent and, hence, cannot constitute prima facie evidence**—partly

* See, *e.g.*, *Leh* v. *General Petroleum Corp.*, 300 F. 2d 288, 301 (9th Cir., 1964) pending here, No. 348.

** Remember, however, that in *Highland Supply Corp.* v. *Reynolds Metals Co.*, *supra*, the FTC proceeding was litigated to a conclusion adverse to the respondent.

because the decisions construing Section 5 have usually involved §5(a).

Since the statutory phraseology is identical in both paragraphs of Section 5, we have also argued that the same words in two paragraphs of the same section of the statute must mean the same thing and that, *ergo*, if an FTC proceeding is not a "civil or criminal proceeding" by "the United States" within the meaning of the prima facie evidence provision in 5(a), neither can it be such a proceeding within the meaning of 5(b), the tolling paragraph. Cf. *Schooler* v. *U. S.* 231 F. 2d 560, 563 (8th Cir., 1956): "In the absence of anything in the statute clearly indicating an intention to the contrary, where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout; and, where its meaning in one instance is clear, this meaning will be attached to it elsewhere. . . ."*

Judge McLaughlin obviously accepted the validity of this reasoning but concluded—wrongly, we believe—that FTC orders were the full legal equivalent of court judgments and decrees for all Section 5 purposes. Plaintiff, however, has always urged the more restricted—if equally untenable—proposition that an FTC proceeding should be capable of tolling limitations even though such a proceeding may not be capable of producing an order admissible as prima facie evidence. Thus plaintiff's argument has rested on the dual proposition that, while Section 5 extends to FTC orders, the two paragraphs—now, and since 1955, two subsections—of Section 5 should be construed separately so that a proceeding that cannot produce qualified evidence under the first paragraph, may nevertheless serve to suspend limitations under the second.

* Compare also, *United States* v. *Cooper Corp.*, 312 U. S. 600, 606 (1941): "It is hardly credible that Congress used the term 'person' in different senses in the same sentence" of the Clayton Act.

The second proposition—although it apparently appealed to Judge Augelli—is as weak as the first. Not only is it gainsaid by the language of the two paragraphs which imposed virtually identical requirements for the type of proceeding contemplated, but Congressional history and judicial authority have established that the only purpose of the tolling provision was to accord private plaintiffs adequate opportunity to invoke a "judgment or decree"—*i.e.*, judicially sanctioned findings of fact and conclusions of law. It follows almost *a fortiori* that the tolling provision was not to apply to a "civil proceeding" which could not result in an admissible judgment or decree.

Certainly nothing said or done in 1914 raised any inference that the two paragraphs were to be read so disjointedly that an FTC proceeding might toll limitations although it could not result in prima facie evidence. Judge McLaughlin acknowledged this (R. 87) and other judges have read the two paragraphs *in pari materia*. In *Momand* v. *Universal Film Exchange*, 43 F. Supp. 996, (D. Mass., 1942) aff'd 172 F. 2d 37 (1st Cir., 1948), Judge Wyzanski held:

> "Since judgments there [in prior government suits] could not serve as prima facie evidence here, those proceedings cannot toll the statute of limitations for the benefit of this plaintiff. This is clear from the juxtaposition of the two paragraphs which together constitute Section 5 of the Clayton Act" (p. 1012).

Other courts have agreed:

> "While we are concerned with the tolling provisions of the second paragraph of that Section [5] only, the two paragraphs are complementary and must be construed together." *Sun Theatre Corp.* v. *RKO*

*Radio Pictures, Inc.*, 213 F. 2d 284, 290 (7th Cir., 1954).

> "The considerations adduced above in connection with the tolling of the statute of limitations should suffice to dispose of the estoppel issue as well, since the two parts of Section 5 here in question are to be construed together." *Samuel Goldwyn Prod.* v. *Fox West Coast Theatres Corp.*, 146 F. Supp. 905, 908 (N.D. Cal., 1956) rev'd on other grounds 328 F. 2d 190, 220 (9th Cir., 1964).

In *Charles Rubenstein, Inc.* v. *Columbia Pictures Corp.*, 154 F. Supp. 216, 218 (D.C. Minn., 1957), aff'd 289 F. 2d 418 (8th Cir., 1961), Judge Nordbye put the matter as follows:

> "It must be remembered that one of the primary purposes of this [tolling] statute was to give private litigants the benefit of decrees in the government litigation."

Judge Nordbye then held, as had Judge Wyzanski, that where a government decree was inadmissible against a defendant in a private action (because the defendant had not been a party to the government proceeding) the limitations period was not tolled. For the very same reason, Judge Augelli here directed New Jersey Wood to reframe its complaint as against Essex to eliminate the Clayton Act charge and, with respect to its Sherman Act claims, to allege the commission of overt acts within the four-year period preceding the original complaint (R. 56a).

Clearly, pendency of an FTC proceeding which cannot create admissible evidence does not and should not toll the statute of limitations since the very purpose for which tolling is provided is absent.

Despite these considerations, the District Court below held that Section 5(b) is much broader in purpose than Section 5(a) and is, in effect, designed "* * * to allow antitrust litigants an opportunity, which might otherwise be barred by the four year statute of limitations, to take advantage of facts uncovered in related Government proceedings" (64a). Since it considered both paragraphs of the Section spacious enough to accommodate FTC proceedings, the Third Circuit did not adopt this view, although Judge McLaughlin commented (R. 89) that the District Court's holding enjoyed "substantial support".

In fact, the "support" carries no weight. Certainly Judge Augelli's expressed reason for his policy determination is not persuasive; indeed, the learned Court seems to have assumed the very point that the FTC did *not* prove in the case at bar. Witness the sentence following that quoted above:

> "Thus, a private party which has suffered damages to its business *by reason of unlawful antitrust activity* is permitted additional time to derive the benefits of a Government investigation" (R. 64a).

If Judge Augelli's view of the scope of Section 5(b) becomes the law, the result will be that any defendant in an antitrust proceeding, whether such proceeding is initiated by the Justice Department, by the FTC or by any other agency vested under Section 7 with antitrust competence, will face an extended limitations period merely by reason of the commencement of the proceeding. Should the proceeding ultimately be dismissed upon a determination that the defendant (or respondent) had not engaged in prohibited conduct or, as in the case at bar, terminate in a consent order before the taking of any testimony, it would be clear that no violation was proved: Certainly

no wrongdoing was proved in the FTC proceeding relied upon by plaintiff here. Thus, it is an insufficient answer to a defendant not found guilty of any wrongdoing to justify any "additional time" on the assumption that "unlawful antitrust activity" was proved. Surely it unfairly penalizes a defendant later found blameless to hold that he must defend against a private antitrust claim for an extended number of years merely because he was the subject of a Government "investigation" and action.*

Nor need we anticipate the argument that the tolling provision becomes illusory if the private suitor must start his action within the four-year period in any event as a hedge against the government's case aborting. It suffices for present purposes to point out that, as a practical matter, the private suitor is prejudiced only by his own indolence and not by the government's failure to secure a usable conviction or decree. Our point is simply that the "civil or criminal proceeding" instituted must—at the very least—be one that *can* produce a judgment or decree, irrespective of whether in fact one does eventuate.

Of course, it remains true that, even though the United States fails to prove a violation, a private plaintiff can still try his action just as though the government had never instituted suit. But tolling was intended to preserve a "final judgment or decree" only where the United States obtained one. Certainly the available legislative history supports this conclusion:

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* The explanation offered in *Fifth & Walnut, Inc.* v. *Loew's, Inc.*, 176 F. 2d 587 (2d Cir., 1949), for making prima facie evidence rest only on a "final judgment or decree" would seem applicable to the tolling provision. After all, said the Court, Section 5, while broadly remedial, is nevertheless so "drastic" in its consequences that it cannot "fairly be applied to cases where the action of the court may still remain in doubt" (p. 593).

> "Many combinations have been dissolved under the Sherman law by the decree of the United States Courts * * *. This proposes to suspend the statute of limitations during the continuation of such suits, and at the end of the suit, if the Government obtains a decree, or a decree is obtained, provides that that may be used in evidence in behalf of the private suitor in a suit for damages under Section 7 of the Sherman law and under the corresponding section of this bill." 51 Cong. Rec. 9164 (1914). (Representative Floyd).

Nor is the holding really supported by the authorities which Judge Augelli cited. Senate Report 619 refers only to the 1955 proposal to extend the tolling period one year following termination of a government proceeding and reflects no more than Congress' intent to give a prospective plaintiff adequate time to assess the effect of a government-obtained judgment or decree upon his particular situation. There is just no support for the notion that Congress intended to toll the statute so that the private plaintiff might—as a substitute for discovery—utilize "facts" developed by the government either in an unsuccessful prosecution or not adduced as evidence in proceeding terminating in an admissible judgment or decree.

Again the 1914 debates are enlightening. That Congress did not contemplate private plaintiffs gaining evidentiary advantages from a contemplated prosecution—as distinguished from the findings and/or rulings contained in the eventual judgment or decree—is clear from Senator Chilton's criticism of the provision:

> "The only demand which I have ever heard from litigants * * * was that the evidence taken by the Government in a prosecution against a trust might be available for a private suitor on the ground that

> the Government is able to get evidence which the private suitor could not. * * * It is my judgment that there would be more relief to those who would be injured by the violation of the antitrust laws if the provision had been that any evidence taken in any trust suit by the United States should be available against the same defendant where certified by the clerk of the court. This would give a litigant a right to the evidence regardless of the outcome of the case. It would give no more effect to that evidence than could be given to it if it had been taken in open court in the second litigation, but it would enable suitors to get evidence which otherwise they could not procure." 51 Cong. Rec. 16003 (1914).

By the same token, an amendment offered to give private litigants the benefit of facts proved in government proceedings was quickly withdrawn when Representative Floyd, among others, pointed out that, under that amendment, the facts established would necessarily bind private plaintiffs as well as defendants, 51 Cong. Rec. 9494-95 (1914).

Nor has Congress since 1914 manifested any intent to grant private litigants any particular advantage from evidence obtained by the Government. The 1950 Hearings contain direct evidence that members of Congress intended no benefit from government proceedings beyond what the statute expressly gave in the case of final judgments:

> "Mr. Michener: I had, within the last few months, an attorney from Michigan come to see me in Washington. He wanted me to assist him in getting certain files in the Department of Justice, which files included an investigation the Department had made of an alleged violation of the antitrust laws. I asked him what he wanted that information for, and he said that he could recover triple damages if he brought suit. Now that the Department of Justice

had looked up this case and had done all of the work, there wasn't anything for him left to do except to start suit; and in those files he would find his proof. *Now, would you want to give a premium to attorneys of that type, who sit around and wait until the Government has developed a case, has spent the money, and then bring suit for triple damages, and get his triple damages based on the work that the Government has done?*

"Mr. Bryson. And maybe have a contract for 50 percent of what they recover.

"Mr. Michener. Yes.

"Mr. Handler. Congressman, the pending bill would not assist the counsel in the case that you have put. The files of the Government are closed to the private litigant. He must establish his case following the normal procedure applicable in the Federal courts himself or he must stand by and await the conclusion of the Government litigation and it is only after the litigation is concluded, and final judgment is entered after contest, that the judgment or decree becomes available to him." 1950 Hearings 5.

That government files are closed to private plaintiffs literally cuts the ground from under any rationalization that Congress somehow intended plaintiffs "to take advantage of facts uncovered" in government proceedings.

If more were needed, certainly the change made in the original proposal to allow the government the right to sue as a private party for single damages is conclusive evidence that Congress intended tolling to occur only in the event of an admissible final decree. The 1950 bill did not allow such suits to create prima facie evidence but did provide that limitations would nevertheless be tolled during their pendency. The American Bar Association's Standing Committee on Commerce protested:

"It does not seem necessary or advisable to include within the purview of Section 5(b) a civil

> action brought by the United States to recover for damages pursuant to Section 4(b) of the proposed act. *A judgment in such a civil action is expressly excluded* from the provisions of Section 5(a) making judgments or decrees in civil or criminal proceedings brought by the United States conclusive evidence against a defendant in a triple-damage action. *There seems to be no good reason, therefore, why under Section 5(b) the statute of limitations should be suspended* during the pendency of a Government suit to recover damages. * * *" 1950 Hearings 97.

After the New York County Lawyers Association echoed this protest the following year, 1951 Hearings 28, the House Committee dropped this tolling proposal from the bill and it did not reappear in 1955 and is not law today.

No more persuasive is *Union Carbide and Carbon Corp.* v. *Nisley*, 300 F. 2d 561, 569 (10th Cir., 1962), app. dism'd 371 U. S. 801 (1962), also cited by the District Court for its novel determination that tolling is allowed in order that private plaintiffs might derive "the benefits of a government investigation" irrespective of its outcome. Plaintiff has repeatedly ballooned a comment by Judge Murrah in *Union Carbide* to the effect that 5(a) and 5(b) are not "co-extensive" into an argument that a commission proceeding tolls the statute of limitations under 5(b) even though it may not be the kind of proceeding that could produce prima facie evidence under 5(a).

While it may be that in some respects the reach of the two paragraphs of Section 5 is not "co-extensive"—*i.e.*, prima facie evidence can arise only from matters *determined* in the government action while tolling applies to all matters *"complained of"*—Judge Murrah hardly supports plaintiff's reading that, while FTC proceedings may fall outside 5(a), nevertheless—and in the face of obvious

language identity in the type of "civil or criminal proceeding" that qualifies under either subsection—5(b) is somehow more liberal than 5(a). In using the phrase upon which plaintiff so heavily relies, Judge Murrah did not address himself to the *kind* or *nature* of the proceeding contemplated by Section 5. He did not suggest—and neither has any other previous authority—that an FTC proceeding will fit the definition of a "civil or criminal proceeding" brought "by the United States" in 5(b) although it would fail to fit the same definition in 5(a). No court before Judge Augelli had suggested that the subsections are any less than "co-extensive" in respect to the basic problem before this Court of whether or not administrative proceedings are included at all. Certainly the statutory language provides no warrant for deciding that administrative proceedings are within the contemplation of the tolling subsection but outside the purview of the evidentiary subsection.

It is a matter quite different from *Union Carbide's* tolling problem to say that Congress intended that an FTC proceeding would toll the statute for a private litigant so that he would not be required to undertake discovery of his own even though the FTC's "final judgment or decree" can never be used as prima facie evidence.

Moreover, *Union Carbide* expressly holds that the two paragraphs of Section 5 "should be construed together" and proceeds to accept the traditional view of the Section's "complementary" purposes:

> "The purpose of the first paragraph of Section 5 was • • • 'to confer, subject only to a defendant's enjoyment of its day in court against a new party, as large an advantage as the estoppel doctrine would afford had the Government brought suit.' • • •

> "The corollary purpose of the tolling provisions * * * is to vouchsafe the intended benefits of related government proceedings by suspending * * * limitations until the termination of the government proceedings. * * *" 300 F. 2d at 569.

Thus if the purpose of Section 5(b) is to lend utility to an "estoppel"—*i.e.*, an estoppel by "judgment or decree" —that purpose is wholly frustrated without the requisite judgment or decree admissible as prima facie evidence. Certainly no estoppel arose in this case upon entry of an FTC consent order; thus the purpose for which tolling is allowed is absent.

### C. In resolving one "anomaly", the courts below have either ignored or created others.

To accommodate an ambiguous statute to a stated purpose of Congress is one thing; to correct what one conceives to be a Congressional oversight in the guise of eliminating an "anomaly" (R. 80) from otherwise unambiguous enactments is quite another. See, *e.g.*, *Addison* v. *Holly Hill Fruit Products*, 322 U. S. 607, 618 (1944). Yet this is precisely what the courts below have done in undertaking to determine what is essentially a question of legislative policy in a piecemeal fashion. Cf. *62 Cases of Jam* v. *U. S.*, *supra*, 340 U. S. at 600.

Thus Judge Augelli, noting that the FTC and the Department of Justice have concurrent jurisdiction to enforce Section 7, simply could not accept as "logical" that Congress intended to have private plaintiffs' rights under Section 5 "turn on the fortuitous circumstance of which agency initiated the action" (R. 64a).

However, over the years, the principal efficacy of Section 5 has derived from the Attorney General's prosecutions of Sherman Act offenders. Is it not also anomalous

that the FTC has no jurisdiction, as such, to enforce the Sherman Act? Of course the FTC does reach conduct violative of the Sherman Act through proceedings instituted under Section 5 of the Federal Trade Commission Act which, in turn, produce orders to cease and desist from such conduct supported by appropriate "evidence" in hearing records. See, *e.g., FTC* v. *Cement Institute,* 333 U. S. 683 (1948). However, respondents in FTC Act proceedings are clearly not thereafter subject to any application of Section 5 of the Clayton Act since the Federal Trade Commission Act is, by statutory definition, excluded from the specific "antitrust laws" referred to in Section 5 and defined in Section 1 of the Clayton Act, 38 Stat. 730, 15 U.S.C. §12; see *Nashville Milk Co.* v. *Carnation Co.,* 355 U. S. 373 (1958).

Thus, even if this Court affirms the courts below, the result will not place Justice Department and FTC proceedings on an equal footing *vis a vis* a private plaintiff but will only create a new disparity (without statutory support) between FTC Clayton Act proceedings which could become a source of prima facie evidence and could toll the statute and FTC Act proceedings designed to reach Sherman Act transgressions before the Commission which could not.

The predictable by-product of any such new disparity—apart from, perhaps, chance assistance to some private plaintiffs—will be a flood of litigation reminiscent of the free-for-all engendered by forty years of Congressional silence on the appropriate period of limitations on private actions.*

* Since FTC complaints frequently charge violations of *both* the FTC Act *and;* for instance, the Robinson-Patman amendments to the Clayton Act, an additional disparity between the Acts for Section 5 purposes can be expected to foment considerable ingenuity by private suitors and district judges to determine just what, in such cases, the FTC did ultimately decide.

Another consideration which militates against Judge McLaughlin's method of correcting the supposed "anomaly" is that, if an FTC order can constitute prima facie evidence, such orders must thereby work estoppels against the Justice Department in any subsequent proceedings. This result necessarily flows from 5(a)'s provision that the "judgment or decree" (affirmance here, of course, depends on equating agency determinations with judicial judgments and decrees) can only be prima facie evidence as to matters "respecting which said judgment or decree would be an estoppel as between the parties thereto". Since affirmance of this decision will mean that the Commission has become "the United States" for Section 5 purposes, the Justice Department will be foreclosed from making the argument which persuaded the courts in *Pfizer* and the other cases cited, *supra,* at pages 20-22, that the FTC is not the United States and the latter is not bound—*i.e.,* estopped—by FTC determinations. Surely, the Justice Department would wish such a result to become law only after a thorough review by Congress of the various aspects of government antitrust enforcement and private treble damage actions which argue for and against such a policy.

Since, in determining the meaning of Section 5, this Court must take cognizance of all antitrust policy considerations including government antitrust enforcement as well as private treble damage actions, it may be well to point out that these two antitrust enforcement mechanisms sometimes do conflict.* However it nowhere appears in the

*After all, statutory anomalies are neither unknown nor odious *per se*. For instance, despite the constant prod from the FTC of which Chairman Gwynne spoke, *supra*, p. 43, Congress did allow the obvious anomaly in the finality of Clayton Act, as against FTC Act, cease and desist orders to persist for the entire twenty-one year period between the 1938 Wheeler-Lea amendment to the FTC Act and the 1959 amendment to Section 11 of the Clayton Act, an anomaly which the Second Circuit ultimately respected in *Brunswick-Balke* and no other court ever challenged.

statutory history that Congress preferred haphazard private suits as the primary enforcement policy. To the contrary, Congress put its principal reliance on action "by the United States" and was prepared, when necessary to simplify government litigation brought to uphold the public interest, to encourage defendants to accept consent decrees that would thereupon be unavailable to private plaintiffs. See *Twin Ports Oil Co.* v. *Pure Oil Co.*, 26 F. Supp. 366, 376 (D. C. Minn., 1939). If the statute of limitations is now to be tolled during the pendency of government "investigations"—regardless of the outcome thereof—and if private plaintiffs are to be supplied with evidence from government investigations, private plaintiffs can be expected to await the results of government investigation, and the usefulness of private actions as an independent means of enforcement of the act will thus be diminished. Of course, it is also true that such a rule would forfeit a major present inducement to respondents in Commission proceedings to accept consent decrees.

Thus, the decisions below have exposed a number of serious anomalies all pertinent to antitrust enforcement policies. Other questions naturally arise:

Is it not also anomalous that the sanctions which a defendant faces when the Justice Department elects to proceed criminally under the Clayton Act are far more drastic than those which the Commission may impose under that Act?

Is it not also anomalous that the "civil proceeding" brought "by the United States" must now be carefully distinguished throughout Section 5 from "action or proceeding . . . by the United States under Section 4A" or are we to understand that the FTC has now acquired jurisdiction under Section 4A to sue for single damages?

Finally, is it not at least ironic, if not anomalous, that the courts below so drastically extended Section 5 to

rescue an indolent plaintiff after Congress had at long last provided a Federal four-year statute of limitations designed mostly to put such actions to rest but also in part to reduce the "time to procrastinate and delay" hitherto attendant upon treble damage litigation? Note Mr. Keating's remarks, *supra*, page 37.

Some of these questions have been debated in Congress over the years, yet, significantly, Section 5 has never been amended in any substantive aspect since its original enactment in 1914. We submit, therefore, that it is for Congress and, with all respect, for Congress alone to formulate specific policies of antitrust enforcement. Cf. *Toolson* v. *New York Yankees, Inc.*, 346 U. S. 356 (1953); *United States* v. *Cooper Corp.*, 312 U. S. 600, 605-6 (1941).

## III

**In any event Section 5 cannot serve to rescue plaintiff's Sherman Act claims.**

Section 5 suspends the statute of limitations only with respect to private rights of action "based in whole or in part on any matter complained of" in the government proceeding. The Court below virtually read this limitation out of Section 5(b) altogther in ruling that the suspension of limitations because of an FTC complaint based solely on the Clayton Act, Section 7, extended as well to plaintiff's conspiracy and attempted monopoly allegations under Sections 1 and 2 of the Sherman Act.

Tolling is to be "strictly construed" and, if available at all, its extent is to be determined by a comparison of the issues tendered in the government suit with those in the related private action. *Leh* v. *General Petroleum Corp.*, 208 F. Supp. 289, 294 (S. D. Cal., 1962) aff'd. 330 F. 2d

288 (9th Cir., 1964); certiorari granted on the point at issue, U. S. , 13 L. Ed. 2d 85 (to be argued this Term, No. 348); see, also *Tague* v. *Balaban*, 146 F. Supp. 356 (N. D. Ill., 1956). The general rule developed in this process has been that the tolling provision "cannot be extended to matters which might have been but were not complained of by the United States. It is restricted to matters actually complained of. The general rules of collateral estoppel apply." *Steiner* v. *20th Century-Fox Film Corp.*, 232 F. 2d 190, 196 (9th Cir., 1956).

For instance Judge Wyzanski was certainly of this view when he held in *Momand* v. *Universal Film Exchange, supra,* 43 F. Supp. at 1012, that a suit by the United States charging a Section 7 violation did *not* toll the statute of limitations for a private plaintiff relying on Sherman Act allegations. The Court was just "not impressed" with the argument that the government action had been broadly tailored to prevent monopoly in the motion picture industry.

In *Steiner,* conspiracies to monopolize the exhibition of motion pictures generally and first run pictures in particular were claimed to be the same conspiracy complained of in *United States* v. *Paramount,* 334 U. S. 131 (1948). Following the interpretation of the tolling provision by Judge Wyzanski in *Momand,* the Ninth Circuit held:

> "General allegations of conduct in violation of the antitrust laws unrelated to the same conduct alleged in a public suit are insufficient to toll the running of a statute of limitations. A greater similarity is needed than that the same conspiracies are alleged. The same means must be used to achieve the same objectives of the same conspiracies by the same defendants." 232 F. 2d at 196.

While the *Steiner* and *Momand* plaintiffs at least alleged the same "right of action", *i.e.* a Sherman Act con-

spiracy, as did the plaintiff in *Union Carbide & Carbon Corp.* v. *Nisley, supra*, the authority cited by both courts below, comparison of the amended complaint in this action (R. 48a-55a) with the FTC's complaint in Docket 7973 (R. 15a-26a) demonstrates that the FTC, in marked contrast to the allegations at bar, put no reliance whatsoever on the Sherman Act. On the contrary, the FTC complaint throughout closely paraphrased Section 7 of the Clayton Act in its claims that the cumulative effect of all acquisitions there cited "may be substantially" to lessen competition or "tend to create a monopoly" in the manufacture, distribution and sale of electrical insulation products (R. 25a). Surely this is hardly "virtually identical" to plaintiff's charges here that the IWI acquisition was effected pursuant to a conspiracy between 3M and Essex formed in 1956 to restrain trade in an attempt by those defendants to monopolize the electrical insulation industry. Cf. *Philco Corp.* v. *R.C.A.*, 186 F. Supp. 155, 159 (E. D. Pa., 1960).

That the "matters complained of" are necessarily—and essentially—different where the theory of antitrust liability differs is particulary obvious when Sherman Act standards are compared with those of Section 7 of the Clayton Act.

The Sherman Act is predicated upon an actual, present "restraint of trade of commerce" (Section 1) or monopolization of "any part of the trade or commerce" (Section 2) whereas Section 7 undertakes to prohibit acquisitions of stock or assets where the effect in any section of the country "may be substantially to lessen competition, or to tend to create a monopoly." Cf. *Momand* v. *Universal Film Exchange, supra.*

Plaintiff here, for reasons sufficient unto itself, has voluntarily charged that 3M—through conspiracy with

Essex Wire—fomented an actual restraint of trade and monopolized commerce in electrical insulation materials in violation of the Sherman Act. In marked contrast, the FTC, by alleging only a Section 7 violation, apparently considered that no actual restraint of trade or monopoly had resulted from 3M's acquisition of the IWI assets. Of course, a private plaintiff is not precluded from attempting to prove that an actual, present restraint resulted from an acquisition to his damage, but he cannot contend that such an actual, present restraint was a "matter complained of" in an FTC antimerger complaint within the intendment of Section 5. Cf. *Steiner* v. *20th Century-Fox Film Corp., supra.*

*United Banana Company* v. *United Fruit Company,* 172 F. Supp. 580 (D. Conn., 1959) illustrates the point that, irrespective of a coincidence of factual allegations, different theories essentially mean different "matters complained of." There the private complaint first alleged a conspiracy and an attempt to monopolize the distribution of bananas with additional counts charging violations of the Robinson-Patman Act by price discriminations against jobbers. Previously a suit by the United States based on the same conspiracy theory had also vaguely alleged that the defendant interfered with independent jobbers "by other means". The Court held that, while count one of the private complaint was tolled during pendency of the government's suit based upon the same conspiracy and monopoly charges, the Robinson-Patman counts were not tolled. Nor was the allegation in the government suit that defendant had interfered "by other means" sufficiently precise to toll plaintiff's later Robinson-Patman allegations.

Similarly, it is manifest that "not every violation of § 7 . . . would necessarily be a violation of the Sherman

Act." *U. S.* v. *The Philadelphia National Bank, supra,* 374 U. S. at 355 (1963); *Times-Picayune Publishing Co.* v. *U. S.,* 345 U. S. 594, 609-610 (1953) See, also, *U. S.* v. *Aluminum Co. of America,* 377 U. S. 271 (1964) citing *Brown Shoe Co.* v. *U. S.,* 370 U. S. 294, 323 (1962).

The contrary contention made by plaintiff here and involving the same statutory sections was squarely rejected in *Gottesman* v. *General Motors Corporation,* 221 F. Supp. 488 (S. D. N. Y., 1963), cert. den. ——U. S.——, 13 L. Ed. 2d 88 (1964) and the rule enunciated in Judge Wyzanski's *Momand* decision and in *United Banana* was invoked in a clear holding that the Clayton and Sherman Acts comprehend intrinsically different matters.

> "It seems too obvious to require discussion that facts on which a finding of a violation of the Clayton Act is based are insufficient to support a finding of a violation of the Sherman Act, since the Clayton Act was intended to catch potential Sherman Act violations in their incipiency. 'Incipiency' denotes 'any time when the acquisition threatens to ripen into a prohibited effect.' United States *v.* E. I. duPont de Nemours & Co., supra, 353 U. S. at 597, 77 S. Ct. at 879, 1 L. Ed. 2d 1057." (P. 492).

Plaintiff's argument is almost one of necessity since there is nowhere a citable instance of a treble damage recovery predicated upon Section 7 of the Clayton Act. It has long been respectable opinion among antitrust practitioners that Section 7 provides no basis for and cannot sustain a treble damage claim. In *Gottesman,* it has now been squarely held that, since private litigants cannot fairly claim to have been damaged by the *potential* restraints of commerce or *tendencies* toward monopoly against which Section 7 inveighs "[t]here can be no claim for money damages for a violation of Section 7." 221 F.

Supp. at 493. See, also, *Highland Supply Corp.* v. *Reynolds Metals Company, supra,* 327 F. 2d at 728, n. 3.

The relevancy of "the matter complained of" becomes most acute in the present context since obviously, if this litigation proceeds, plaintiff will eventually have to face up to this question directly. If we are correct in our assumption of the law, plaintiff must forego Section 7 altogether and stand solely on the Sherman Act with its heavier proof requirements and an obvious dearth of the requisite overt acts within the four-year damage period. This being so it is fair to ask now—and directly—whether the FTC proceeding against 3M was in any respect intended or designed "to prevent, restrain, or punish violations of" the Sherman Act so as to suspend or toll the limitations otherwise applicable to plaintiff's Sherman Act allegations?

A negative answer follows upon a reading of the FTC's explicit complaint (R. 15a-28a) since clearly the Commission was concerned—as is Section 7 itself—solely with potential damage to competition and not with the random impact, however grievous, upon any particular entity claiming to be a competitor. As this Court emphasized in *Brown Shoe, supra,* 370 U. S. at 320:

> "Taken as a whole, the legislative history [of Section 7] illuminates congressional concern with the protection of *competition,* not *competitors,* and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition." (Emphasis by the Court.)

A comparison of the factual allegations of the two complaints clearly shows that the similarity in "matters complained of" is far more apparent than real. Indeed, the only point of reference common to both complaints is the acquisition by 3M from Essex Wire of the IWI assets in August, 1956. To the FTC this was merely the

final step in a series of acquisitions which, taken together, warranted the conclusion that 3M's "acquisitions, acts and practices" (all in the plural) violated Section 7. New Jersey Wood's Sherman Act charges, however, start where the FTC left off. According to its complaint, the IWI acquisition marked the formation of a conspiracy which, at the point IWI ceased to purchase New Jersey Wood's products in January, 1957, directly injured plaintiff in the conduct of its business.

Thus, the two complaints relate to two different periods of time. The FTC complaint deals with the years 1952 through 1956 ending with the acquisition in suit; on the other hand the time span in plaintiff's complaint begins with August, 1956, the date of origination of the conspiracy according to plaintiff, and proceeds to describe later acts furthering the alleged conspiracy.

There are many instances in which a significant difference in the time span covered by the two proceedings has precluded the tolling of limitations. Most recently in *International Shoe Machine Corp.* v. *United Shoe Machinery Corp.*, 315 F. 2d 449 (1st Cir., 1963), cert. den., 375 U. S. 820 (1963), the Court held that a private plaintiff could not rely upon a conspiracy proved by the government to toll the statute of limitations where the proof in the government's case had been closed eighteen months before the start of plaintiff's damage period. See also *Park Neponent Corp.* v. *Smith*, 258 F. 2d 452 (1st Cir., 1958); *Orbo Theatre Corp.* v. *Loew's Inc.*, 156 F. Supp. 770 (D.D.C., 1958), aff'd 261 F. 2d 380 (D. C. Cir., 1958) cert. den. 359 U. S. 411 (1958); *Paramount Film Distributing Corp.* v. *Village Theatre, Inc.*, 228 F. 2d 721 (10th Cir., 1955); *Hillside Amusement Co.* v. *Warner Bros. Pictures Distributing Corp.*, 224 F. 2d 629 (2d Cir., 1955); *Charles Rubenstein, Inc.* v. *Columbia Pictures*

*Corp.*, 176 F. Supp. 527 (D. C. Minn., 1959); *Fanchon & Marco, Inc.* v. *Paramount Pictures, Inc.*, 133 F. Supp. 839 (S. D. N. Y., 1955).

Similarly in our case, every act alleged by plaintiff to have furthered the conspiracy (and the attempt to monopolize) occurred *after* the time period covered by the FTC complaint except for the IWI acquisition in August, 1956. And that acquisition is not available as a foundation for a "right of action" based on conspiracy because no such conspiracy was complained of by the FTC.

It could hardly be more clear that (a) a multilateral conspiracy (b) resulting in an actual restraint of trade or a present monopoly (c) to the personal damage (d) of a competitor (e) which was first felt in January, 1957, present legal and factual issues so far removed from (f) a four-year series of acquisitions ending in August, 1956, (g) where the effect may be "substantially to lessen competition, or to tend to create a monopoly" as to wholly defy comparison.

Thus, quite apart from the novel and unique extension of Section 5 to regulatory agency proceedings, it appears that the courts below have seriously obscured, if not virtually eliminated, an important limitation on the scope of Section 5(b) in conflict with numerous decisions to the contrary. Surely the FTC's Clayton Act proceeding against 3M in Docket 7973 could, in no event, serve to toll or extend limitations otherwise applicable to plaintiff's charges of Sherman Act violations.

## Conclusion

The decisions below extend the coverage of Section 5 so far beyond the ascertainable ken of Congress as to represent a clear and wholly unwarranted invasion of the legislative province.

With neither legislative history nor considered judicial or professional opinion providing any support and in view of the Constitutional implications involved in converting the results of administrative proceedings and procedures to prima facie evidence by statutory fiat, it is submitted that the decision below should be, in all respects, reversed and the amended complaint insofar as it propounds liability for any act occurring prior to November 20, 1957, dismissed, as barred by Section 4B of the Clayton Act.

Respectfully submitted,

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